(1) 89-372

No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMANDA ACQUISITION CORPORATION,

Petitioner,

—v.—

UNIVERSAL FOODS CORPORATION, ALAN R. ANDERSON, MICHAEL E. BATTEN, DR. OLAN D. FORKER, DR. CAROL I. WASLIEN GHAZAII, LEON T. KENDALL, PAUL L. KOHNSTAMM, CHARLES S. MCNEER, ORVILLE R. MEERTZ, JOHN L. MURRAY, DR. BERNARD S. SCHWEIGERT, GUY A. OSBORN, GERARD E. VENEMAN and DARRELL E. WILDE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. May a State, consistent with the Commerce Clause, enact legislation that is intended to, and does, effectively eliminate nationwide hostile tender offers for shares of corporations incorporated in that State?

2. Is the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which has historically governed the determination whether any State statute violates the Commerce Clause by reason of its incidental effects on interstate commerce, now exclusively limited in application to State statutes that expressly discriminate against interstate commerce?

3. May a State, consistent with the Supremacy Clause, enact legislation that allows the board of directors of a target corporation (a) to delay consummation of a tender offer indefinitely beyond the 60-day period prescribed by the Williams Act and (b) ultimately to foreclose shareholders from deciding whether to accept a tender offer made in compliance with the Williams Act?

RULE 28.1 LIST OF PARTIES

Petitioner Amanda Acquisition Corporation ("Amanda") is a shell corporation organized by its parent, High Voltage Engineering Corporation ("High Voltage"), for the sole purpose of effecting a tender offer for shares of Respondent Universal Foods Corporation ("Universal"). Berisford International plc is an affiliate of High Voltage. Universal does not have any parent corporation.

RULE 28.4(c) STATEMENT

The provisions of 28 U.S.C. § 2403(b) are applicable in this case. Pursuant to that statute, the District Court notified the Attorney General of the State of Wisconsin that the constitutionality of the Wisconsin Business Combination Act, Wis. Stat. § 180.726 (the "Wisconsin Act" or "Act"), had been placed in issue. The Attorney General intervened in the proceedings below, filing briefs in support of the Act both in the District Court and in the Court of Appeals.

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OPINIONS BELOW

The Decision and Order of the United States District Court for the Eastern District of Wisconsin (App. 42) (the "District Court Order") denying Amanda's motion to enjoin application of the Wisconsin Act to Amanda's tender offer for all of the shares of Universal common stock was entered on March 18, 1989, and is reported at 708 F. Supp. 984. The Opinion of the United States Court of Appeals for the Seventh Circuit (App. 17) (the "Seventh Circuit Opinion" or "Opinion") affirming the District Court Order, was entered on May 24, 1989, and is reported at 877 F.2d 496.

JURISDICTION

The judgment of the Court of Appeals (App.14) was entered on May 30, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent text of the following constitutional and statutory provisions is set forth in the Appendix:

1. The Commerce Clause, U.S. Const. art. I, § 8, cl. 3 (App. 1).

2. The Supremacy Clause, U.S. Const. art. VI, cl. 2 (App. 1).

3. The Wisconsin Business Combination Act, Wis. Stat. § 180.726 (App. 2).

4. Sections 14(d)-(e) of the Williams Act amendments to the Securities Exchange Act of 1934, 15 U.S.C. 78n(d)-(e) (App. 13).

STATEMENT OF THE CASE

The Offer. This action was commenced by Petitioner Amanda on December 1, 1988, the date on which Amanda announced an all-cash tender offer for all shares of Respondent Universal at $30.50 per share, or a total of approximately $539 million (the "Tender Offer" or "Offer").[1] The Offer contemplates a second-step cash merger at the same price paid for shares tendered into the Offer. It is a condition to the Offer and to Amanda's financing for the Offer that Amanda be able to consummate a merger promptly after buying shares in the Offer (the "merger condition"). It is an additional condition to the Offer and to Amanda's financing that the Wisconsin Act be judicially invalidated or be determined to be inapplicable to the Offer (the "Business Combination Act condition"). (App. 19-20.)

Although the Offer price is now more than 50% higher than the price at which Universal stock traded a few weeks before the Offer began, Universal's Board of Directors has consistently opposed it. By operation of the Wisconsin Act, the Board's refusal to approve the Offer precludes any merger (or other business combination) between Universal and Amanda for three years after any acquisition of shares by Amanda under its Offer. (App. 20.) As a result of the Seventh Circuit's sustaining the Act, the Offer—which complies fully with Federal law (App. 51-61)—cannot be consummated because the Merger and Business Combination Act conditions cannot be satisfied. Amanda and its parent, High Voltage, still wish to acquire control of Universal but cannot do so unless the Seventh Circuit Opinion is reversed and the Act invalidated so that they can consummate a prompt merger upon the purchase of enough Universal stock to ensure a successful merger vote.

The Wisconsin Act. The Wisconsin Act erects an absolute bar to any merger or other business combination between an

1 The Offer was subsequently increased in stages to $38 per share or more than $687 million.

"interested stockholder" (i.e., a 10% stockholder) and a "resident domestic corporation" (which includes Wisconsin corporations, like Universal, that have their principal executive offices in Wisconsin). This merger bar extends for three (3) years from the date on which the interested stockholder first acquires 10% or more of the corporation's stock (e.g., as Amanda would in the Tender Offer). The merger bar is automatic unless the proposed merger, or the 10% + stock acquisition, is approved in advance by the board of directors of the target corporation. The effect of the Wisconsin Act is to permit the incumbent board of directors, rather than the shareholders, to decide whether a tender offer may proceed whenever the offer contains a merger condition. Ninety percent (90%) of all offers made contain merger conditions. (App. 21.)

Shareholders are powerless under the Wisconsin Act to override or dissolve the merger bar even if they overwhelmingly desire to see a particular tender offer consummated. Instead, the Act vests in the incumbent directors the exclusive power to exempt offers from the merger bar and, consequently, the exclusive power to determine whether shareholders will ever have the opportunity to consider a tender offer on the merits.

The Wisconsin Act is typical of the more potent business combination acts now in force in twenty-four (24) States.[2] Each of these statutes is intended to, and does, act as an anti-takeover mechanism available to the target company board of directors in any tender offer for control of the corporation. Among other things, the Act prevents anyone who acquires control of a corporation without the prior approval of the incumbent directors from effecting a merger with, or consummating any other significant transaction involving the assets of, the corporation, even after the acquiror owns the vast majority of the corporation's shares. The Act thereby prevents a hostile[3] tender offeror from exercising effective control over the corporation.

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2 The statutes are listed in n. 10, *infra*.

3 "Hostile" tender offers refer to offers that are unsolicited and have not been approved by the target company's board of directors.

In order for virtually any tender offer—including the Amanda Tender Offer—to be practical, the tender offeror must be able to exercise control over the acquired corporation's assets after consummation of the offer. Only in that way can a bidder maximize the value of the target company's assets, as by achieving synergies through consolidation, reorganization and the like. That is the reason why lenders (such as Amanda's lenders) insist on merger conditions in tender offer financing agreements. It also explains why 90% of all tender offers include merger conditions. The Wisconsin Act is designed to prevent tender offers by precluding the possibility that any merger condition can be satisfied.

Protectionist Origins of the Wisconsin Act. The history of the Act demonstrates that, as the District Court found, it was enacted to protect domestic Wisconsin corporations from takeovers by out-of-State purchasers. The Act was adopted on September 17, 1987, by a special session of the Wisconsin Legislature that had been convened by the Governor specifically to consider legislation to repel an all-cash tender offer for all shares of the G. Heileman Brewing Company (a Wisconsin corporation) by a non-Wisconsin bidder. *RTE Corp. v. Mark IV Indus., Inc.*, No. 88C-378, slip op. at 5, 1988 U.S. Dist. Lexis 6609 at *5-*6 (E.D. Wis. May 6, 1988), *vacated as moot*, [1987-1988] Fed. Sec. L. Rep. (CCH) ¶ 93,789 (E.D. Wis. June 22, 1988).

The District Court found on an uncontroverted record that: "It appears undisputed that the Act *was intended* to deter hostile tender offers for Wisconsin corporations; and it is reasonably likely that the statute *will have* this effect." (App. 68; emphasis added.) The Court of Appeals did not disturb these findings (or any other findings concerning the Act's protectionist purposes). Quite the contrary, the Seventh Circuit acknowledged that the Act is fatal to almost all hostile tender offers: "As a practical matter, Wisconsin prohibits any offer contingent on a merger between bidder and target, a condition attached to about 90% of contemporary tender offers." (App. 21.)

The District Court also identified specific "protectionist motivations" underlying the Act, including "the evident desire to protect resident domestic corporations against hostile takeovers that might result in target corporation operations *leaving Wisconsin*." (App. at 80; emphasis added.) Consequently, while the Wisconsin Act is drafted in the form of an intrastate corporate governance statute, its purpose and effect, as judicially determined, are to prohibit purchases of securities in, and attempts to acquire, Wisconsin corporations. This anti-takeover intent and operation are inherent in the structure of business combination acts generally, as discussed below.

Proceedings Below. Amanda filed suit to enjoin Universal and its Board of Directors from invoking the Act against the Offer and to obtain other relief on December 1, 1988. Jurisdiction was predicated on 28 U.S.C. §§ 1331, 1332, 1337 and 1343; 15 U.S.C. § 78aa; and the doctrine of pendent jurisdiction. On March 18, 1989, the District Court entered its Order denying Amanda's motion for preliminary injunctive relief against operation of the Act, holding, *inter alia*, that the Act is constitutional under both the Supremacy and Commerce Clauses. (App. 76, 81.) Amanda appealed the District Court Order to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1291(a)(1). On May 24, 1989, the Court of Appeals affirmed the District Court Order. (App. 41.)

REASONS FOR GRANTING THE WRIT

This case presents the Court with a rare opportunity to review the constitutionality of a widespread, virulent type of State takeover legislation—the business combination act—that has been developed to halt hostile tender offer activity. The constitutionality of the particular business combination act at issue, the Wisconsin Act, has been challenged by the Securities and Exchange Commission ("SEC") as violative of both the Commerce and Supremacy Clauses.[4]

A decision by this Court is important because tender offer activity is a multibillion dollar segment of the national market for corporate control,[5] and almost half the States have enacted some form of business combination act in order to bring such activity to a standstill.[6] There is, moreover, widespread uncertainty and confusion in the lower courts and State legislatures as to the constitutional parameters of State takeover legislation in light of this Court's decision in *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987).

Equally important, in its Commerce Clause analysis, the court below expressly declined to apply the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), to determine whether the incidental effects of the Act on interstate commerce are clearly excessive in relation to the putative local benefits it

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4 The SEC filed an amicus brief challenging the constitutionality of the Wisconsin Act in the *RTE* case, in which the District Court enjoined the Act on Commerce Clause grounds last year. The SEC also challenged the constitutionality of the Delaware Business Combination Act, Del. Code tit. 8, § 203, in *RP Acquisition Corp. v. Staley Continental, Inc.*, 686 F. Supp. 476 (D. Del. 1988).

5 More than $60 billion worth of hostile offers were commenced in 1988, resulting in transactions valued in excess of that sum. *See* W.T. Grimm & Co., *Mergerstat Review 1988* 86-88 (1989) ($49.7 billion exclusive of the Philip Morris Companies Inc., bid for Kraft, Inc.); *Wall Street J.*, Oct. 31, 1988, at A3, Col. 1 ($13.1 billion Philip Morris bid for Kraft). This $60 billion sum does not include consensual transactions, the value of which in 1988 separately amounted to more than $155 billion. W.T. Grimm & Co., *supra*, at 89.

6 *See* n. 10, *infra*.

confers. The Court of Appeals articulated the view, endorsed by certain commentators and courts, that the *Pike* balancing test should be applied only when assessing the constitutionality of State statutes that expressly discriminate against interstate commerce (App. 34), as by discriminating against out-of-State residents or creating a risk of inconsistent regulation. The reach and viability of the *Pike* test is an issue about which there is substantial confusion in the lower courts, three Circuits having rejected the Seventh Circuit approach. The constitutional ramifications of this issue extend far beyond the viability of takeover statutes, affecting legislation of all types.

Accelerating Adoption of Anti-takeover Acts Since CTS. The importance of the questions presented for review is in part a product of the staggering volume of state anti-takeover legislation enacted in the 28 months since the *CTS* decision. In *CTS*, this Court upheld the States' authority to enact takeover statutes that protect shareholders by granting them the power to deliberate collectively about, and vote on, the merits of tender offers, provided that the vote occurs within the 60-day time period prescribed by the Williams Act. Since *CTS*'s endorsement of these statutes, known as control share acquisition acts, there has been "a flood of new state laws meant to shield local target companies." *Nat'l L.J.*, July 10, 1989, at 24, col. 3. *See generally* R. Winter, R. Rosenbaum, M. Stumpf & L. Parker, STATE TAKEOVER STATUTES AND POISON PILLS 7-11 (1988).

Because control share legislation, such as the Indiana Act, empowers shareholders to decide for themselves whether to approve any change of corporate control, it does not serve the purpose of preventing—or even deterring—tender offers. To achieve that objective, many States (including Wisconsin) turned to a diametrically opposed form of statute, one which divests shareholders of all decisionmaking power and places that power entirely in the hands of incumbent management. That statute is the business combination act.

Business Combination Acts. Business combination acts, such as the Wisconsin Act, represent the most potent form of

anti-takeover law conceived to date. Business combination acts prohibit for a period of years (generally, three to five years) any "business combination" between a "resident domestic corporation" and an "interested stockholder," unless the corporation's board of directors has approved the business combination before the proponent has become an "interested stockholder." In each act, the phrase "business combination" is sweepingly defined to include, among other things, any merger or consolidation with the target company; any transaction (e.g., sale, lease, exchange or pledge) involving 5% or more of the target company's assets; even re-incorporation of the target in another State.[7] "Resident domestic corporation" is uniformly defined to ensure that it covers all public companies of any size—that is, all those whose absence from the State would be noticed or felt if they were to be acquired and moved elsewhere. The definition usually encompasses companies which are incorporated in the legislating State and which have either their principal executive offices, significant business operations or 10% of their shareholders or their shares in the State.[8] An

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7 *See* Ariz. Rev. Stat. Ann. § 10-1201(6) (Supp. 1988); 1988 Conn. Legis. Serv. P.A. 88-350 § 1(5); Del. Code Ann. tit. 8, § 203(c)(3) (Supp. 1988); Ga. Code Ann. § 14-2-236(2) (Supp. 1988); Idaho Code § 30-1701(6) (Supp. 1988); Ind. Code Ann. § 23-1-43-5 (1989); 1989 Kan. Sess. Laws S.B. 116 § 1(c); Ky. Rev. Stat. Ann. § 271B.12-200(4) (1989); Me. Rev. Stat. Ann. tit. 13-A, § 611-A(3)(E) (Supp. 1988); Md. Corp. & Ass'ns. Law Code Ann. § 3-601(e) (1989); 1989 Mass. Acts. ch. 242, § 8(3)(c); Minn. Stat. Ann. § 302A.011, subd. 46 (Supp. 1989); Mo. Ann. Stat. § 351.459(5) (Supp. 1989); Neb. Rev. Stat. § 21-2437 (1988); N.J. Stat. Ann. § 14A:10A-3(e) (Supp. 1989); N.Y. Bus. Corp. Law § 912(a)(5) (1986); Pa. Stat. Ann. tit. 15, § 1911(5) (Supp. 1989); S.C. Code Ann. § 35-2-205 (1988); Tenn. Code Ann. § 48-35-203(5)(1989); Va. Code Ann. § 13.1-725 (1989); Wash. Rev. Code Ann. § 23A.50.020(a) (Supp. 1989); Wis. Stat. § 180.726(1)(e); Wyo. Stat. § 17-18-102(b)(iv) (1989).

8 *See, e.g.*, Ariz. Rev. Stat. Ann. § 10-1201(13); 1988 Conn. Legis. Serv. P.A. 88-350 § 1(11); Ga. Code Ann. § 14-2-140; Idaho Code § 30-1701(11); Ind. Code Ann. § 23-1-43-13; 1989 Mass. Acts ch. 242, § 8(3)(c); Minn. Stat. Ann. § 302A.011, subds. 8, 12; Mo. Rev. Stat.

"interested stockholder" is one who owns a threshold amount of stock. The threshold varies from 5% to 25%, depending on the State.[9]

Prevalence. Business combination acts have been adopted by twenty-four (24) States, in which 784 of the 1,000 largest American corporations are incorporated.[10] Significantly, two legislatures, Massachusetts and Illinois, passed business combination

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§ 351.459(13); Neb. Rev. Stat. § 21-2002; N.J. Stat. Ann. § 14A:10A-3(m); N.Y. Bus. Corp. Law § 912(1)(13) (Supp. 1989); Pa. Stat. Ann. tit. 15, § 1002(6); S.C. Code Ann. § 35-2-213; Tenn. Code Ann. § 48-35-203(15); Wis. Stat. Ann. § 180.726(1)(L); Wyo. Stat. § 17-18-102(6)(vii).

9 Ariz. Rev. Stat. Ann. § 10-1201(11)(a) (10%); 1988 Conn. Legis. Serv. P.A. 88-350 § 1(9) (10%); Del. Code Ann. tit. 8, § 203(c)(5) (15%); Ga. Code Ann. § 14-2-1110(11) (10%); Idaho Code § 30-1701(10) (10%); Ind. Code Ann. § 23-1-43-10 (10%); Kan. Sess. Laws S.B.116 § 1(e)(1) (15%); Ky. Rev. Stat. Ann. § 271B.12-200(10) (10%); Me. Rev. Stat. Ann. tit. 13-A, § 611-A(2)(H) (25%); Md. Corp. & Ass'ns. Law Code Ann. § 3-601(j) (10%); 1989 Mass. Acts ch. 242, § 8(5)(g) (5%); Minn. Stat. Ann. § 302A.011, subd. 49 (10%); Mo. Ann. Stat. § 351.459(10) (20%); Neb. Rev. Stat. § 21-2440 (10%); N.J. Stat. Ann. § 14A:10A-3(j) (10%); N.Y. Bus. Corp. Law § 912(a)(10) (20%); Pa. Stat. Ann. tit. 15, § 1911(11)(i)(a) (20%); S.C. Code Ann. § 35-2-210 (10%); Tenn. Code Ann. § 48-35-203(11) (10%); Va. Code Ann. § 13.1-725 (10%); Wash. Rev. Code § 23A.08.425 (20%); Wis. Stat. Ann. § 180.726(1)(j) (10%); Wyo. Stat. § 17-18-102(b)(vii) (15%).

10 Ariz. Rev. Stat. Ann. § 10-1221; 1988 Conn. Legis. Serv. P.A. 88-350; Del. Code Ann. tit. 8, § 203; Ga. Code Ann. § 14-2-1110; Idaho Code § 30-1701; 1989 Ill. Laws ch. 32, § 11.75; Ind. Code Ann. § 23-1-43-18; 1989 Kan. Sess. Laws S.B. 116; Ky. Rev. Stat. Ann. § 271B.12-200; Me. Rev. Stat. Ann. tit. 13-A, § 611-A; Md. Corp. & Ass'ns Law Code Ann. § 3-600; 1989 Mass. Acts ch. 242; Minn. Stat. § 302A.673; Mo. Rev. Stat. § 351.459; Neb. Rev. Stat. § 21-2432; N.J. Stat. Ann. § 14A:10A-1; N.Y. Bus. Corp. Law § 912; Pa. Stat. Ann. tit. 15, § 1911; S.C. Code Ann. § 35-2-201; Tenn. Code Ann. § 48-35-201; Va. Code Ann. § 13.1-725; Wash. Rev. Code Ann. § 23A-50.010; Wis. Stat. § 180.726; Wyo. Stat. § 17-18-101. For a compendium of the 784 major corporations incorporated in these States, *see The Business Week Top 1000: America's Most Valuable Companies*, BUS. WK., April 14, 1989, at 273-295.

acts following the Seventh Circuit Opinion in this case, an opinion which has been widely interpreted as an authoritative constitutional dispensation for legislation of this sort.[11] At least three other States have, within the past 60-90 days, had business combination acts pending before their respective legislatures.[12]

Constant Repetition Consistently Evading Review. The constitutionality of business combination acts has been heavily litigated but, due to the rapid pace at which most takeover bids are resolved, the issue has never before reached a Federal court of appeals or State supreme court. According to data filed with the SEC, in the eighteen months between January 1, 1988, and June 30, 1989, sixty-four (64) hostile tender offers were commenced for shares of corporations protected by State business combination acts.[13] Twenty-two (22) bidders immediately commenced litigation challenging the constitutionality of those statutes, and forty-one (41) others announced plans or reserved rights to do the same. None of these litigations reached a Federal court of appeals or State supreme court.[14] It is only because

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11 The Massachusetts act was signed into law on July 18, 1989, as 1989 Mass. Acts ch. 242. The Illinois statute (1989 Ill. Laws ch. 32, § 11.75) was signed into law on August 2, 1989.

12 Haw. H.B. 3160, 14th Leg., 1988 Reg. Sess.; Tex. H.B. 2554, 71st Reg. Sess.; Vt. H.B. 471, 60th Biennial Sess.

13 This figure and the following data in this paragraph are based upon a review of Offers to Purchase filed with the SEC as exhibits to Schedules 14D-1.

14 Moreover, all but one of the seven lower court decisions in these litigations rejected the line of analysis applied by the Seventh Circuit in this case. The six district courts that issued written opinions uniformly endorsed the view that business combination acts are unconstitutional unless they afford tender offerors a "meaningful opportunity for success" in their offers—e.g., by providing an exception to the merger bar if a reasonable, specified percentage of shares is tendered into the offer and bought by the bidder. *See BNS, Inc. v. Koppers Co.*, 683 F. Supp. 458, 469 (D. Del. 1988); *RP Acquisition Corp. v. Staley Continental, Inc.*, 686 F. Supp. 476, 482 (D. Del. 1988); *City Capital Assocs.*

(1) the respondent, Universal, has not been acquired by a third party and (2) the petitioner, Amanda, and its parent, High Voltage, have already spent over $15 million in furtherance of the Offer, that it is possible and makes economic sense for them to pursue the constitutional questions in this Court. The fact that business combination statutes are effective in squelching offers should not succeed in insulating them from review by this Court.

Serious Constitutional Questions. The constitutional questions are serious and have far-reaching implications. Under *CTS* and this Court's earlier decision in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), State takeover statutes are constitutional if, and to the extent that, they promote shareholder choice concerning a tender offer and do so within the 60-day tender offer timeframe set by the Williams Act. But business combination acts foreclose shareholder choice and dispense with the Williams Act timetable altogether. As a result, they are not sustainable under these decisions.

In *CTS*, two themes were interwoven into, and were essential elements of, this Court's analysis. First, a corporation is a creature of State law, and the States consequently have broad authority to regulate internal corporate affairs. 481 U.S. at 89. Second, the Indiana Control Share Acquisition Act promoted, and did not inhibit, informed shareholder choice concerning a hostile tender offer. *Id.* at 91-92. These twin themes recurred in both the Supremacy and Commerce Clause analyses. 481 U.S. at 82 n.7, 83-4, 86, 89, 91-3. Equally important, moreover, was

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L.P. v. Interco Inc., 696 F. Supp. 1551, 1555 (D. Del.), *aff'd on other grounds*, 860 F.2d 60 (3d Cir. 1988); *West Point-Pepperell, Inc. v. Farley Inc.*, 711 F. Supp. 1088, 1096 (N.D. Ga. 1988); *Topper Acquisition Corp. v. Emhart Corp.*, No. 89-00110-R, slip op. at 10 (N.D. Va. March 23, 1989). *Accord RTE*, slip op. at 8, 1988 U.S. Dist. Lexis 6609 at *8-*9. The only decision not in conflict with the Opinion below appears in an oral transcript in *Vernitron Corp. v. Kollmorgen Corp.*, No. 89 Civ. 241 (JES) (S.D.N.Y. Feb. 9, 1989), a case which was decided on ripeness grounds but does contain dicta consistent with the Seventh Circuit Opinion.

this Court's premise that the Indiana statute was a bona fide corporate law, the primary purpose of which was to "protect the shareholders of Indiana corporations." *Id.* at 91.

Business combination acts present an irreconcilable conflict between the two themes central to *CTS*, and do so in a context in which the *CTS* premise is inapt. Concededly, business combination acts are consonant with the recognition that corporations are creatures of State law subject to State regulation. However, these statutes preclude rather than promote shareholder choice concerning tender offers, vesting exclusive decisionmaking authority in the incumbent board of directors. Moreover, the primary purpose of business combination acts is not to protect shareholders but to thwart hostile tender offers, regardless of shareholder preference or welfare, and the statutes are structured to do just that.[15]

A basic flaw in the Court of Appeals' analysis is that it focuses exclusively on the power of the States to enact corporate governance legislation and ignores the Wisconsin Act's designed preclusion of shareholder choice and its admittedly protectionist roots and aspirations. The implications of the Seventh Circuit's analysis are extensive and not limited to validation of business combination acts. For example, control share acquisition acts are now in force in twenty-two (22) States, in which 253 of the 1,000 largest American corporations are incor-

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15 The correlation between the structural anti-takeover intent of business combination acts generally and the explicitly protectionist purposes of the Wisconsin Act is not coincidental or unique. Business combination acts are designedly protectionist and have frequently been enacted to protect particular corporations from specific takeover threats. The Minnesota Business Combination Act, for example, was passed to protect Dayton-Hudson Corporation from a threatened takeover by the Dart Group (*Wall St. J.*, June 26, 1987, at 6, col. 1); the Washington Act was passed for the benefit of Boeing Corporation (*Wall St. J.*, Aug. 11, 1987, at 3, col. 4); and the Arizona Act was passed to assist Greyhound Corporation (*Ariz. Bus. Gazette*, July 27, 1987, § 1 at 1A).

porated.[16] To the extent that these statutes parallel the Indiana statute sustained in *CTS*, they are obviously constitutional. Several, however, have been significantly modified to produce a telling anti-takeover effect by imposing barriers that block a bidder from calling for the shareholder vote that the bidder needs before it may fully vote all shares it acquires in its tender offer.[17] If the Seventh Circuit's analysis is correct, the States are free to enact virtually any shareholder-disenfranchising anti-takeover legislation they choose, provided only that the legislation is denominated as "corporate governance" in nature. Yet, form aside, shareholder disenfranchisement legislation is substantively irreconcilable with the express holding of *CTS*.

Conflict with Supreme Court Precedent. The Seventh Circuit Opinion conflicts with applicable Supreme Court prece-

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16 *See* Ariz. Rev. Stat. Ann. §§ 10-1211 to 10-1217 (Supp. 1988); Fla. Stat. Ann. § 607.109 (1989); Haw. Rev. Stat. §§ 415-172, 415-173 (Supp. 1988); Idaho Code § 30-1601 (Supp. 1988); Ind. Code Ann. § 23-1-42-1 (1989); Kan. Stat. Ann. §§ 17-1286 to 17-1298 (1989); La. Rev. Stat. Ann. §§ 12:135-12:140.2 (Supp. 1989); 1989 Md. Laws ch. 51; Mass. Gen. Laws Ann. chs. 110D, 110E (Supp. 1989); Mich. Comp. Laws Ann. § 450.1790 (Supp. 1989); Minn. Stat. Ann. § 302A.671 (Supp. 1989); Mo. Ann. Stat. § 351.407 (Supp. 1989); Neb. Rev. Stat. §§ 21-2432 to 21-2453 (1988); Nev. Rev. Stat. Ann. §§ 78.378-379 (1988); N.C. Gen. Stat. § 55-90 (Supp. 1988); Ohio Rev. Code Ann. § 1701.831 (1985); Okla. Stat. Ann. tit. 18, §§ 1145-1155 (Supp. 1989); 1989 Or. Laws ch. 4; S.C. Code Ann. §§ 35-2-101 to 35-2-111 (Supp. 1988); Tenn. Code Ann. § 48-35-301 (1988); Utah Code Ann. § 61-6-1 (Supp. 1989); Va. Code Ann. §§ 13.1-728.1-9 (1989). *See* BUS. WK. April 14, 1989, at 273-295 (n. 10, *supra*) for the names of the 253 major corporations incorporated in these States.

17 The most egregious example is the Virginia statute, Va. Code Ann. § 13.1-728.5, which permits a bidder to demand a shareholder meeting as of right only if, among other things, the bidder makes its proposal during a specific 30-day window period during the year or first purchases 5% of the target company's stock—something which a bidder may be loath or unable to do in light of the purchase size limitations and pre-purchase notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a. *See also* Ariz. Rev. Stat. Ann. § 10-1215 (Supp. 1988); Idaho Code § 30-1607 (Supp. 1988); La. Rev. Stat. Ann. § 12:140 (Supp. 1989); 1989 Md. Laws ch. 51; Mich. Comp. Laws Ann. § 450-1798 (Supp. 1989); Minn. Stat. Ann. § 302A.671, subd. 4a (Supp. 1989).

dent, specifically *CTS* and *MITE*. While the Wisconsin Act is drafted in corporate governance guise (as a merger moratorium statute), it is in fact, and concededly, aimed directly at halting hostile tender offers. As the Court of Appeals correctly observed, the Act is structured to defeat the 90% of all hostile offers that contain merger conditions. This effective elimination of nationwide tender offers for Wisconsin corporations distinguishes the Wisconsin Act from the Indiana statute upheld in *CTS* and places it on par with the Illinois statute invalidated in *MITE*. The Illinois statute prohibited a bidder "from offering to purchase, or from purchasing, shares in [State] corporations, or from attempting thereby to gain control." *CTS*, 481 U.S. at 93. The Wisconsin Act does not formally prohibit the offer but is equally effective in preventing the purchase or attempt to gain control. In all essential respects, the Wisconsin Act is, in fact, the *MITE* statute transplanted from the securities code to the business corporations act. It was admittedly designed to achieve the same end: to obstruct the transmigration of economic assets (business corporations, jobs and attendant economic activity) across State lines by preventing tender offers. As discussed in more detail below, the Act is designed to circumvent the strictures of *MITE* and constitutes a direct—or, at least, an infirm indirect—restraint on interstate commerce in violation of the Commerce Clause. Moreover, the Court of Appeals' indirect restraint analysis dispensed with the governing *Pike v. Bruce Church* balancing test.

The Act is equally infirm under the Supremacy Clause. Under *CTS* and *MITE*, a State statute that promotes shareholder choice, one that "grant[s] shareholders the power to deliberate collectively about the merits of tender offers, . . . is fully in accord with the purposes of the Williams Act," *CTS*, 481 U.S. at 82 n. 7—provided that this statute does not delay tender offers longer than the 60-day maximum period Congress established for tender offers in 15 U.S.C. § 78n(d)(5). *Id.* at 85. In contrast, a statute that interposes a third party to pass on the fairness of an offer at the expense of shareholder choice, or that operates to favor management against an offeror by permitting it " 'to stymie indefinitely a takeover,' " represents " 'an

approach quite in conflict with that adopted by Congress.' " *MITE*, 457 U.S. at 637, 639-40 (plurality opinion). The Wisconsin Act is structured to dispense with shareholder choice, collective or otherwise, on a hostile tender offer. It permits a board of directors to delay the offer indefinitely (or permanently to veto it) so that the offer never comes to the attention of the shareholders, in derogation of both shareholder choice and the 60-day maximum tender offer time period established by Congress. For the reasons discussed in more detail below, the Act is, therefore, invalid under the Supremacy Clause.

The Act Violates the Commerce Clause. The factual findings of the courts below—(1) that the Wisconsin Act was intended to thwart hostile tender offers and (2) that it has that effect—have immediate Commerce Clause repercussions. This statute directly regulates interstate transactions and, under the controlling standards established by this Court, a direct regulation of interstate transactions is a *per se* violation of the Commerce Clause. *See, e.g., MITE*, 457 U.S. at 640 (plurality opinion); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) ("When a state statute directly regulates or discriminates against interstate commerce . . . we have generally struck down the statute without further inquiry").

This conclusion is reinforced by the Court's recent opinion in *Healy v. Beer Institute, Inc.*, 57 U.S.L.W. 4748 (June 19, 1989), which invalidated Connecticut's beer-price-affirmation statute under the Commerce Clause. Quoting from and citing the *MITE* plurality opinion at length, the *Healy* decision stressed that: "The critical inquiry is whether the practical effect of [a state] regulation is to control conduct beyond the boundaries of the State." 57 U.S.L.W. at 4752. *See also id.* at 4751 n. 9 and 4752 n. 13 (" ' "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power" ' ") (quoting the *MITE* plurality opinion.)

The *MITE* plurality opinion, as reaffirmed by *Healy*, is particularly instructive because the most offensive features of the

Wisconsin Act have their antecedents in the Illinois statute invalidated in *MITE*. In *MITE*, the target was a publicly-held Illinois corporation with shareholders scattered around the country. The plurality observed that the bidder "necessarily employed interstate facilities in communicating its offer, which, if accepted, would result in transactions occurring across state lines. These transactions would themselves be interstate commerce." 457 U.S. at 642.

The flaw in the Illinois Act, the plurality emphasized, was that the statute sought to prevent the bidder "from making its offer and concluding interstate transactions not only with . . . stockholders living in Illinois, but also with those living in other States and having no connection with Illinois." *Id.* It did so by permitting a third party—the Illinois Secretary of State—to pass on the fairness of the offer and potentially to prevent shareholders from ever having the opportunity to accept or reject it. Since the statute would apply even if not a single one of the target's shareholders were a resident of Illinois, the act could therefore be applied to regulate a tender offer which would not affect a single Illinois shareholder. The plurality therefore concluded that the statute was invalid as "a direct restraint on interstate commerce . . . [which] has a sweeping extraterritorial effect." 457 U.S. at 642. The plurality stressed that the Commerce Clause "precludes the application of a State statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Id.* at 642-43. Because the Illinois Act purported "to regulate directly and to interdict interstate commerce, including commerce wholly outside the State," it was invalidated. *Id.* at 643.

The same analysis applies in full to the Wisconsin Act. Universal is a Wisconsin corporation with shareholders scattered across the country. Amanda's Tender Offer employs interstate facilities and, if accepted, Amanda's acquisition of Universal shares will itself occur in interstate commerce. But the Wisconsin Act, like the Illinois law in *MITE*, seeks to prevent Amanda from concluding interstate transactions not only with Universal stockholders living in Wisconsin but also with those living in

other States. It does so by interposing a third party—the target company's board of directors—which has the statutory right to pass on the fairness of the offer and can prevent shareholders from ever having the opportunity to accept or reject it. The Wisconsin Act on its face would apply even if not a single one of Universal's shareholders were a resident of Wisconsin. The Act, as patently as the Illinois Act in *MITE*, was conceived and enacted for the express purpose of interdicting interstate transactions in securities. The only notable difference between the two statutes is that, in light of *MITE*, the Wisconsin Act was engrafted into a corporate code, rather than a securities code. This distinction is purely formal, not substantive, and therefore not constitutionally significant. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Near v. Minnesota ex rel. Olsen*, 283 U.S. 697, 708 (1931); *see also Trop v. Dulles*, 356 U.S. 86, 94 (1958).

There is no dispute that the Wisconsin Act reflects the legislative "desire to protect resident domestic corporations against hostile takeovers that might result in target corporation operation leaving Wisconsin" (App. 80). This "motivation of protecting local businesses . . . flies in the face of a core commerce clause value: avoiding local protectionism with respect to the interstate movement of economic resources." Langevoort, *The Supreme Court and the Politics of Corporate Takeovers: A Comment on CTS Corp. v. Dynamics Corp. of America*, 101 HARV. L. REV. 96, 107 (1987) (citing *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 43-44 (1980)). The Wisconsin Act, accordingly, is invalid as a direct restraint on interstate commerce.

At the very least, the Act's direct, designed impact on interstate transactions represents an indirect restraint on interstate commerce and triggers the balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). *See also MITE*, 457 U.S. at 643 (majority opinion); *cf. Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 844-45 (1st Cir. 1988). Under that test also, the Act is invalid.

Under the Commerce Clause, a State's indirect interference with interstate commerce is unconstitutional unless the burden

imposed both effectuates a "legitimate state interest" and is not "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142; *see also MITE*, 457 U.S. at 643 (majority opinion). In *MITE*, the majority held that the Illinois statute unconstitutionally intruded into interstate commerce because it blocked nationwide tender offers, precluding shareholder choice:

> The most obvious burden the Illinois Act imposes on interstate commerce arises from the statute's previously described nationwide reach which purports to give Illinois the power to determine whether a tender offer may proceed anywhere.
>
> The effects of allowing the Illinois Secretary of State to block a nationwide tender offer are substantial. *Shareholders are deprived of the opportunity to sell their shares at a premium.*

457 U.S. at 643 (majority opinion; emphasis added).

The *MITE* majority emphatically rejected the notion that a purported local interest in protecting shareholders justified the substantial burdens imposed on the right of shareholders across the nation to receive and accept tender offer bids:

> As the Court of Appeals noted, the disclosures required by the Illinois Act which go beyond those mandated by the Williams Act and the regulations pursuant to it *may not substantially enhance the shareholders' ability to make informed decisions.* It also was of the view that the possible benefits of the potential delays required by the Act may be outweighed by the increased risk that the tender offer will fail due to defensive tactics employed by incumbent management. We are unprepared to disagree with the Court of Appeals in these respects, and conclude that the protections the Illinois Act affords resident security holders are, for the most part, speculative.

Id. at 645 (citation omitted; emphasis added).

Like the statute voided in *MITE*, the Wisconsin Act removes from shareholders the decision whether to accept or reject a tender offer. Also like the statute voided in *MITE*, the Act tips the scales in favor of incumbent management—to the point of granting the board of directors a veto power which, under the *MITE* statute, was conferred only on a disinterested State official.

In *CTS*, by comparison, the Indiana statute left the question whether a tender offer would succeed squarely in the hands of the shareholders. Under the *CTS* statute, shareholders would decide by a majority vote whether to accord the bidder full voting rights in the shares to be acquired. As a practical matter, that constitutes a vote on whether the offer can be consummated. Because the statute neither usurped from the shareholders the ultimate decision on takeover bids nor unreasonably tipped the balance in favor of either bidder or management, the burden on interstate commerce was found not excessive.

This Court emphasized in *CTS* that:

> A State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in *ensuring that investors in such corporations have an effective voice in corporate affairs.*

481 U.S. at 91 (emphasis added). The Wisconsin Act is crafted to prohibit any such voice.

The Wisconsin Act cannot, therefore, be saved by analogy to the statute upheld in *CTS* and instead must fall like the statute in *MITE*. The Act is not a traditional State corporate voting provision which "promote[s] the autonomy of independent shareholders." 481 U.S. at 92. It is what it was designed to be: an anti-takeover statute. *See Hyde Park Partners*, 839 F.2d at 844-45.

Even legal scholars who support State takeover statutes see the Wisconsin act as "reprehensible protectionist" legislation.[18]

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18 *See, e.g.*, Booth, *The Promise of State Takeover Statutes*, 88 MICH. L. REV. 1635, 1675 n. 146, 1676 (1988).

Nor is such legislation justified by the Seventh Circuit's observation that "our Constitution allows the States to act as laboratories" (App. 39). The Constitution does not afford each State the discretion to exempt corporations whose shares are publicly traded on the national securities exchanges from the full consequences of their participation in the national economy, which the Commerce Clause is intended to preserve intact. At the very least, this means that non-Wisconsin investors have the same right to choose whether to sell their shares into a nationwide tender offer for shares of Wisconsin corporations they own as they do into an offer for shares of non-Wisconsin corporations they own.

The impact of the Wisconsin Act on interstate offers is apparent. As against its substantial interference in the national securities markets and the national economy, there exist no countervailing legitimate local interests which justifies the impact on interstate commerce. The interests of economic protectionism that the Act was enacted to advance are illegitimate in the extreme. The Supreme Court's decisions in *MITE* and *CTS* are, as in the case of the Supremacy Clause analysis (discussed *infra*), dispositive as to the Act's invalidity under the Commerce Clause.

The Seventh Circuit's Rejection of *Pike* Balancing. The Court of Appeals never reached the question whether the incidental effects imposed by the Act on interstate commerce are clearly excessive in relation to the local benefits putatively conferred by the Act. The court below did not engage in this balancing analysis, as prescribed by *Pike*, on the theory that the scope and reach of the *Pike* decision should be circumscribed in a way never countenanced by a majority of this Court and rejected by at least three Circuits. Because of the broad ramifications of its circumscription of *Pike*, the Commerce Clause analysis employed in the Seventh Circuit Opinion has an impact far beyond the context of state anti-takeover statutes.

The Court of Appeals, following the concurrence in *CTS* (481 U.S. at 95), opined that *Pike* balancing should never be employed, regardless of a State statute's "baleful effects" on

interstate commerce, as long as the statute does not expressly discriminate against persons based on their State of residence or impose regulation that is inconsistent with that actually or potentially imposed by sister States on the same transaction. (App.34, 37.) The court below did not base its refusal to engage in *Pike* balancing on any holding of this Court but rather on an empirical insight—on a "closer examination of the cases" that "may support the conclusion that the Court has looked for discrimination rather than baleful effects." (*Id.*) This is an interpretation of Supreme Court precedent that has the support of certain commentators cited by the Court of Appeals (*id.*) and, evidently, of the Third Circuit. *See J. Filberto Sanitation, Inc. v. N.J. Dep't of Envtl. Protection*, 857 F.2d 913, 922 (3d Cir. 1988).[19]

However, this interpretation was endorsed solely by the concurring opinion in *CTS*, and it has properly been rejected by three other Courts of Appeals as well as by this Court in post-*CTS* opinions. The Ninth Circuit—in a recent case involving state wholesale milk price regulation—concluded that this Court in *CTS* did engage in precisely the balancing analysis eschewed by the Seventh Circuit, even though the Indiana statute in *CTS* did not discriminate against out-of-State residents or create a risk of inconsistent State regulation. *Country Classic Dairies, Inc. v. Montana Dep't of Commerce Milk Control Bureau*, 847 F.2d 593, 595 (9th Cir. 1988). Similarly, the Sixth Circuit, in enjoining extraterritorial application of the Tennessee business combination act (and other takeover statutes), reaffirmed the applicability of the *Pike* balancing test in evaluating State takeover legislation under the Commerce Clause in *Tyson Foods, Inc. v. McReynolds*, 865 F.2d 99, 101-102 (6th

19 *See also* Garden, *CTS Corp. v. Dynamics Corp. of America: A State's Rights to Tend to Its Tender Offers*, 37 AM. U. L. REV. 947, 980 (1988) (*CTS* effectively exempts a State's regulation of its domestic corporations from *Pike* balancing); Boyer, *When It Comes to Hostile Tender Offers, Just Say No: Commerce Clause and Corporation Law in CTS Corp. v. Dynamics Corp. of America*, 57 U. CIN. L. REV. 539, 584-85 (1988) (*CTS* has created two Commerce Clauses, one for rights created by State law, as to which no balancing is permitted, and another for all other State regulation of goods in interstate commerce).

Cir. 1989). *See also* the First Circuit's opinion in *Hyde Park Partners*, 839 F.2d at 845 ("the direct regulation of interstate transactions of goods triggers the *Pike* analysis, even if the goods originate in the legislating state"). *Accord Campeau Corp. v. Federated Dep't Stores*, 679 F. Supp. 735, 738 (S.D. Ohio 1988); *Veere Inc. v. Firestone Tire & Rubber Co.*, 685 F. Supp. 1027, 1032 (N.D. Ohio 1988).

This pro-balancing position, too, has support among certain commentators. *See, e.g.*, Note, *State Plant Closing Legislation: A Modern Justification for the Use of the Dormant Commerce Clause as a Bulwark of National Free Trade*, 75 VA. L. REV. 845, 872 (1989). Yet other commentators express frank uncertainty as to the status of *Pike* balancing after *CTS*. Langevoort, *The Supreme Court and the Politics of Corporate Takeovers: A Comment on CTS Corp. v. Dynamics Corp. of America*, 101 HARV. L. REV. 96, 103 n. 45 (1987).

As the foregoing reflects, the Seventh Circuit's rejection of the *Pike* balancing test is illustrative of substantial confusion and uncertainty that warrants clarification by this Court. The case for clarification is particularly compelling because this Court has continued to apply *Pike* balancing since *CTS* without articulating any limits on the scope of that test's applicability—and it has done so over the objection of the lone concurring Justice in *CTS*, on whose analysis the Seventh Circuit effectively relied. *See, e.g., Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 109 S.Ct. 1262, 1282 (1989); *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 108 S.Ct. 2218, 2220 (1988) (*see also id.* at 2223-24, Scalia, J., concurring). The Court of Appeals' rejection of *Pike* was outcome determinative and, we submit, wrong. Clarification of the status of the *Pike* balancing test is of enduring importance to constitutional jurisprudence.

The Wisconsin Act Is Preempted by the Williams Act. Under the Supremacy Clause, impermissible conflict between Federal and State law will be found not only where compliance with both is physically impossible, but also

> where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *CTS*, 481 U.S. at 78-79.

The Wisconsin Act frustrates the purposes and objectives of the Federal legislation for the regulation of tender offers, the Williams Act, 15 U.S.C. § 78n(d)-(e). Under the Wisconsin Act, a tender offer that is conditioned on a merger (as almost all are) cannot proceed unless incumbent management approves, and shareholders have no say in the matter. Absent board approval, the offer is indefinitely delayed and may be permanently vetoed. That is the purpose and effect of the Wisconsin Act. The Williams Act, in contrast, is designed to permit shareholders to decide for themselves, on an informed basis, whether to accept a tender offer—and to permit them to do so within 60 days of the offer's commencement. The two statutes are irreconcilable.

The Williams Act establishes a comprehensive, uniform, national system of regulation of all aspects of interstate tender offers. In enacting the Williams Act in 1968, Congress recognized that tender offers serve beneficial economic functions by, among other things, providing investors an opportunity to sell their shares at advantageous premiums over prevailing market prices. The Williams Act also reflects Congress' recognition that tender offers serve a useful purpose in providing a check on entrenched but inefficient management of publicly-held corporations. 113 Cong. Rec. 24664 (1967); S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968).

Throughout, the Williams Act reflects the intent of Congress that, when an interstate offer is made for the shares of a publicly held corporation, its success or failure should be left to the free, informed judgment of the corporation's shareholders. The Williams Act is intended to establish even-handed regulation that favors neither the offeror nor incumbent management of

the target corporation, but leaves the decision concerning acceptance or rejection of the tender offer to the independent shareholders of the target corporation. To achieve these ends, the Williams Act requires, *inter alia*, that shareholders be given both (1) specific information deemed by the SEC to be material to an intelligent decision to sell their securities or to decline the opportunity to do so and (2) an adequate, but not unduly long, period of time within which to digest that information.[20]

The underlying purpose of the Williams Act is to protect investors by preserving their right, free of coercion from either bidder or management, to make informed investment decisions concerning their shares. *CTS*, 481 U.S. at 81-82. In *MITE*, a plurality of this Court opined that, through the Williams Act, "Congress sought to protect the investor not only by furnishing him with the necessary information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice." *Id.* at 634.

As a necessary part of its policy of protecting investor choice, Congress mandated a policy of strict neutrality between the bidder and management of the target company. *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 9 (1985) ("legislative intent was to preserve a neutral setting" between management and bidder). As this Court explained fourteen years ago:

> Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts. Indeed, the Act's draftsmen commented upon the "extreme care" which was taken "to *avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid.*"

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20 The District Court found that Amanda's disclosures fully complied with the Williams Act requirements and, accordingly, denied a motion by Universal to enjoin the Tender Offer on disclosure grounds. (App. 51-61.) Universal did not appeal this ruling.

Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58-59 (1975) (emphasis added; quoting S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967)); *accord MITE*, 457 U.S. at 633 (plurality opinion).

To accomplish its objectives, the Williams Act established a comprehensive regulatory scheme to carry out the policies and purposes of the legislation. Similarly, the SEC regulations promulgated pursuant to the Williams Act are also specifically designed to "ensure a balance between the interests of the person making a tender offer and the management of the company whose securities are being sought while providing disclosure and substantive protections to shareholders making investment decisions" (SEC Exchange Act Release No. 16384). The purpose of the Williams Act in mandating adequate disclosure and a reasonable, but not protracted, period of time within which shareholders may consider the disclosures is to ensure that shareholders have sufficient information on which to base a choice whether or not to tender—and to be sure that they have the opportunity to make that choice.

The Wisconsin Act makes no pretense at neutrality between bidder and target or the advancement of free, informed choice by target company shareholders. Rather, it vests all discretion to accept or reject a tender offer in the hands of the target company's board of directors, which can delay the offer indefinitely or permanently veto it. This is incompatible with the Congressional purposes and objectives underlying the Williams Act, as elucidated by this Court in *CTS* and *MITE*.

The *CTS* decision, and a comparison of the Indiana statute it upheld with the Wisconsin Act now at issue, are instructive. The Federal policy of permitting shareholders to make critical investment decisions freely was the cornerstone of this Court's decision in *CTS*. The constitutionality of the Indiana takeover statute was sustained because that statute (far different from the Wisconsin Act) promoted, rather than undermined, shareholder autonomy.

The Indiana statute in *CTS* provided that a hostile acquiror of a significant stock interest in a corporation could not exercise

voting rights of shares acquired in excess of 20% of the total outstanding except by obtaining the approval of a majority of the "disinterested shareholders" of the corporation (i.e., shareholders unaffiliated with either the hostile acquiror or incumbent management). This approval was to be granted in a shareholder vote conducted either before or after commencement of a bid but, in any case, not more than fifty days following a request by a bidder for such a vote.

This Court, utilizing the reasoning of its earlier decision in *MITE*, held that the salient question for preemption purposes was whether the statute promoted or undermined shareholder choice, which is intended under the Williams Act to be the final arbiter in control contests. Under this standard, the Court held that the Indiana statute was consonant with Federal policy and legislation. Rather than altering the balance between bidder and management, the Indiana statute did not grant excessive advantages to incumbent management and affirmatively protected shareholder autonomy from the competing pressure of either side. 481 U.S. at 82. The Indiana statute did not permit anyone other than target shareholders to decide on the merits of a bid. *Id.* at 83-84. *See also id.* at 82 n. 7 (the "principal result" of the Indiana statute was "to grant shareholders the power to deliberate collectively about the merits of tender offers. This result is fully in accord with the purposes of the Williams Act"). Nor did it provide management with opportunities for unreasonable delay or obstruction of offers. *Id.* at 82-84. Focusing on the 60-day maximum tender offer period created by the Williams Act, 15 U.S.C. § 78n(d)(5), this Court ruled that the potential delay of up to 50 days contemplated by the Indiana statute did not conflict with the Williams Act because it fell well within the 60-day period established by Congress. 481 U.S. at 85.

The Wisconsin Act, in contrast, fails on all counts. It does not purport to be neutral between bidder and target. It was passed on an emergency basis to permit a particular target company management to block an all-cash, all-shares tender for a Wisconsin company, and it is available to be put to the same use by management of every other "resident domestic corporation" of the State. Further, in operation, the Act totally disre-

gards the 60-day Williams Act tender offer period, permitting the target's board of directors to block hostile tender offers indefinitely.

The invalidity of the Wisconsin Act is equally apparent under the earlier decision in *MITE*, in which a plurality of this Court concluded that the Williams Act preempted an Illinois takeover statute. Under the statute at issue in *MITE*, the Illinois secretary of state was empowered to hold hearings on the substantive fairness of the offer and to prohibit it if the secretary found it to be "inequitable." The statute granted target management effective power, in many cases, to invoke the hearing provisions of the statute. The *MITE* plurality concluded that the Illinois statute provided target management with a "powerful weapon to stymie indefinitely a takeover," a statutory weapon sufficiently inconsistent with the Federal policy of investor autonomy to require its invalidation on preemption grounds. 457 U.S. at 637; *see also id.* at 635, 639. The Wisconsin Act vests incumbent management with even more power to preclude shareholder choice concerning an offer. No appeal to an ostensibly independent State official is involved. The target company's board has the direct, not indirect, power to prevent the offer from ever coming before the shareholders for their consideration.

The Seventh Circuit upheld the Act, in part, on the ground that it regulates corporate mergers, a traditional area of State authority, and does not operate by "tinkering with any of the procedures established in federal law" governing the tender offer process. (App. 30-32.) This analysis exalts form so as to ignore substance. It disregards the genesis, purpose and effect of the Act: to stop hostile tender offers. The Act, by prohibiting post-offer mergers (and other business combinations) absent board approval, obliterates any opportunity for exercise of the very shareholder autonomy and choice that the Williams Act "procedures" were intended to protect and promote. The Act is not a "traditional" internal corporate affairs statute but a subterfuge intended to thwart the goals of the Williams Act, crafted to avoid judicial invalidation after frontal legislative

assaults on tender offers, as such, were foreclosed by this Court's decision in *MITE*.[21]

While the Seventh Circuit recognized that "[s]tates have used the leeway afforded by § 28(a) [of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a)] to carry out 'merit regulation' of securities—'blue sky' laws," the court made the unjustified inference that § 28 "allows states to stop some transactions Federal law would permit, in pursuit of an approach at odds with a system emphasizing disclosure and investors' choice." (App. 28.) Since mergers were an area that States have traditionally regulated, the Seventh Circuit apparently deemed State anti-takeover laws that forbid post-tender offer mergers without board consent to be nothing more than a specie of that unchallenged State power to regulate corporate affairs. (*Id.*) The Seventh Circuit's analysis, however, fails to recognize that State anti-takeover statutes like Wisconsin's have a direct and designedly preclusive impact upon a subject matter—interstate tender offers—that is now regulated by Federal statute. State statutes that are devices for interdicting interstate tender offers under the guise of regulating mergers are invalid.[22]

It is no answer to say, as the Court of Appeals did, that "[i]nvestors can turn to firms incorporated in States committed

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21 The Seventh Circuit's analogy to staggered terms for directors and supermajority merger vote provisions (App. 30)—an analogy drawn from *CTS*—is inapt because, unlike business combination acts, such provisions do not foreclose the ability of a bidder to consummate a tender offer or merger and because they are mechanisms approved by shareholders to regulate shareholder, not management, voting.

22 Section 28(a) could not have been intended to address State anti-takeover laws, which were unknown at the time this statute was enacted in 1934. Indeed, 34 years later when Congress enacted the Williams Act, only Virginia had a takeover statute, and there is no indication in the legislative history that Congress was aware of the existence of that statute. *See MITE*, 457 U.S. at 631 n. 6 (plurality opinion). State anti-takeover laws are not of the same character as the blue sky laws that Congress intended to preserve in 1934. Nor is there anything in the legislative history of the Williams Act to suggest that Congress intended § 28(a) to save State anti-takeover laws from Federal preemption.

to the dominance of market forces"—i.e., buy shares in non-Wisconsin corporations if they want to sell into a hostile tender offer. (App. 41.) (A more telling admission of the balkanizing effect of the Act is difficult to imagine.) Investors have an equal right to choose whether to sell into a tender offer for shares of any Wisconsin corporation they own as into any other offer. The Wisconsin Business Combination Act is preempted by the Williams Act. *See* Kozyris, *Corporate Takeovers at the Jurisdictional Crossroads*, 36 UCLA L. REV. 1109, 1117-18 (1989).

CONCLUSION

This Court should grant certiorari to define the limits of State power to encroach upon the national tender offer process regulated by the Williams Act and to clarify the status of the *Pike* balancing test.

Respectfully submitted,

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Commerce Clause
U.S. Const. art. I, § 8, cl. 3.

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Supremacy Clause
U.S. Const. art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

WISCONSIN BUSINESS COMBINATION ACT
Wis. Stat. § 180.726.

Restrictions on certain business combinations involving a resident domestic corporation and interested stockholder

(1) Definitions. In this section:

(a) "Affiliate" has the meaning given in s. 180.725(1).

(b) "Announcement date" means the date of the first public announcement of the final, definitive proposal for a business combination.

(c) "Associate" of a person means any of the following:

1. A corporation or organization of which the person is an officer, director or partner or is the beneficial owner of at least 10% of any class of voting stock.

2. A trust or other estate in which the person has a substantial beneficial interest or as to which the person serves as trustee or in a similar fiduciary capacity.

3. A relative or spouse of the person, or a relative of the spouse, who has the same principal residence as the person.

(d)1. "Beneficial owner" of stock means a person, except as provided in subd. 2, that meets any of the following conditions:

a. Individually, or with or through any of the person's affiliates or associates, beneficially owns the stock, directly or indirectly.

b. Individually, or with or through any of the person's affiliates or associates, directly or indirectly has the right, whether exercisable immediately or only after the passage of time, to acquire the stock pursuant to a written or unwritten agreement, arrangement or understanding or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise.

c. Individually, or with or through any of the person's affiliates or associates, directly or indirectly has the right to vote the stock pursuant to a written or unwritten agreement, arrangement or understanding, except that a person is not the benefi-

cial owner of stock under this subd. 1.c if the agreement, arrangement or understanding to vote that stock arises solely from a revocable proxy or consent given in response to a proxy or consent solicitation made in accordance with the applicable regulations under the exchange act and is not reportable under the report required under 17 CFR 240.13d-1(1)(a) or a comparable or successor report.

d. Has a written or unwritten agreement, arrangement or understanding with another person that is directly or indirectly a beneficial owner, or whose affiliates or associates are direct or indirect beneficial owners, of the stock, if the agreement, arrangement or understanding is for the purpose of acquiring, holding, disposing of or voting the stock, unless the voting is pursuant to a revocable proxy or consent described in subd. 1.c.

2. A person is not the direct or indirect beneficial owner of stock tendered pursuant to a tender or exchange offer which is made by that person or an affiliate or associate of that person until the tendered stock is accepted for purchase or exchange.

(e) "Business combination" means any of the following:

1. A merger, including a merger under s. 180.685, or consolidation of the resident domestic corporation or any subsidiary of the resident domestic corporation with any of the following:

a. An interested stockholder.

b. A corporation, whether or not it is an interested stockholder, which is, or after a merger or consolidation would be, an affiliate or associate of an interested stockholder.

2. A sale, lease, exchange, mortgage, pledge, transfer or other disposition, in one transaction or a series of transactions, to or with an interested stockholder or an affiliate or associate of an interested stockholder of assets of the resident domestic corporation or a subsidiary of the resident domestic corporation if those assets meet any of the following conditions:

a. Have an aggregate market value equal to a least 5% of the aggregate market value of all the assets, determined on a consolidated basis, of the resident domestic corporation.

b. Have an aggregate market value equal to at least 5% of the aggregate market value of all the outstanding stock of the resident domestic corporation.

c. Represent at least 10% of the earning power or income, determined on a consolidated basis, of the resident domestic corporation.

3. The issuance or transfer by the resident domestic corporation or a subsidiary of the resident domestic corporation, in one transaction or a series of transactions, of any stock of the resident domestic corporation or a subsidiary of the resident domestic corporation if all of the following conditions are satisfied:

a. The stock has an aggregate market value equal to at least 5% of the aggregate market value of all the outstanding stock of the resident domestic corporation.

b. The stock is issued or transferred to an interested stockholder or an affiliate or associate of an interested stockholder, except for stock of the resident domestic corporation or such subsidiary issued or transferred pursuant to the exercise of warrants, rights or options to purchase such stock offered, or a dividend paid, or distribution made, proportionately to all stockholders of the resident domestic corporation.

4. The adoption of a plan or proposal for the liquidation or dissolution of the resident domestic corporation which is proposed by, on behalf of, or pursuant to a written or unwritten agreement, arrangement or understanding with, an interested stockholder or an affiliate or associate of an interested stockholder.

5. Any of the following, if the direct or indirect effect is to increase the proportionate share of the outstanding stock of a class or series or securities convertible into voting stock of the resident domestic corporation or a subsidiary of the resident domestic corporation beneficially owned by the interested stockholder or an affiliate or associate of the interested stockholder, unless the increase is the result of immaterial changes due to fractional share adjustments:

a. A reclassification of securities, including, without limitation, a stock split, stock dividend or other distribution of stock in respect of stock, or reverse stock split.

b. A recapitalization of the resident domestic corporation.

c. A merger or consolidation of the resident domestic corporation with a subsidiary of the resident domestic corporation.

d. Any other transaction, whether or not with, into or involving the interested stockholder, which is proposed by, on behalf of, or pursuant to a written or unwritten agreement, arrangement or understanding with, the interested stockholder or an affiliate or associate of the interested stockholder.

6. Receipt by an interested stockholder or an affiliate or associate of an interested stockholder of the direct or indirect benefit of a loan, advance, guarantee, pledge or other financial assistance or a tax credit or other tax advantage provided by or through the resident domestic corporation or any subsidiary of the resident domestic corporation, unless the interested stockholder receives the benefit proportionately as a holder of stock of the resident domestic corporation.

(g) "Consummation date" means the date of consummation of a business combination.

(h)1. "Control", "controlled by" or "under common control with" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting stock, except as provided in subd. 2, by contract, or otherwise.

2. "Control" of a corporation is not established under subd. 1 if a person, in good faith and not for the purpose of circumventing this section, holds voting power as an agent, bank, broker, nominee, custodian or trustee for one or more beneficial owners who do not individually or as a group have control of that corporation.

(i) "Exchange act" means the securities exchange act of 1934[1] and amendments thereto.

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1 15 U.S.C.A. § 78a et seq.

(j)1. "Interested stockholder", with respect to a resident domestic corporation, means a person other than the resident domestic corporation or a subsidiary of the resident domestic corporation that meets any of the following conditions:

a. Is the beneficial owner of at least 10% of the voting power of the outstanding voting stock of that resident domestic corporation.

b. Is an affiliate or associate of that resident domestic corporation and at any time within 3 years immediately before the date in question was the beneficial owner of at least 10% of the voting power of the then outstanding voting stock of that resident domestic corporation.

2. For the purpose of determining whether a person is an interested stockholder, the number of shares of voting stock of the resident domestic corporation considered outstanding includes shares beneficially owned by the person but does not include any other unissued shares of voting stock of the resident domestic corporation which may be issuable pursuant to an agreement, arrangement or understanding, or upon exercise of conversion rights, warrants or options, or otherwise.

(l)1. "Resident domestic corporation" means a domestic corporation that, as of the stock acquisition date in question, satisfies any of the following:

a. Its principal executive offices are located in this state.

b. It has significant business operations located in this state.

c. More than 10% of the holders of record of its shares are residents of this state.

d. More than 10% of its shares are held of record by residents of this state.

2. For purposes of subd. 1.c and d, the record date for determining the percentages and numbers of shareholders and shares is the most recent shareholder record date established under s. 180.26 before the stock acquisition date in question, and the

residence of each shareholder is the address of the shareholder which appear on the records of the resident domestic corporation.

(m) "Stock" means any of the following:

1. Shares, stock or similar security, certificate of interest, participation in a profit sharing agreement, voting trust certificate, or certificate of deposit for any of the items described in this subdivision.

2. Security which is convertible, with or without consideration, into stock, or any warrant, call or other option or privilege of buying stock, or any other security carrying a right to acquire, subscribe to or purchase stock.

(n) "Stock acquisition date", with respect to any person, means the date that that person first becomes an interested stockholder of that resident domestic corporation.

(o) "Subsidiary" of a resident domestic corporation means any other corporation, whether or not a domestic corporation, of which voting stock having a majority of the votes entitled to be cast is owned, directly or indirectly, by the resident domestic corporation.

(p) "Voting stock" means capital stock of a corporation, whether or not a domestic corporation, entitled to vote generally in the election of directors.

(2) Business combinations during the 3 years after the stock acquisition date. Except as provided in sub. (5), a resident domestic corporation may not engage in a business combination with an interested stockholder of the resident domestic corporation for 3 years after the interested stockholder's stock acquisition date unless the board of directors of the resident domestic corporation has approved, before the interested stockholder's stock acquisition date, that business combination or the purchase of stock made by the interested stockholder on that stock acquisition date.

(3) Business combinations more than 3 years after the stock acquisition date. At any time after the 3-year period described in sub. (2), the resident domestic corporation may engage in a business combination with the interested stockholder but only if any of the following is satisfied:

(a) The board of directors of the resident domestic corporation has approved, before the interested stockholder's stock acquisition date, the purchase of stock made by the interested stockholder on that stock acquisition date.

(b) The business combination is approved by the affirmative vote of the holders of a majority of the voting stock not beneficially owned by the interested stockholder at a meeting called for that purpose.

(c) The business combination meets all of the following conditions:

1. Holders of all outstanding shares of stock of the resident domestic corporation not beneficially owned by the interested stockholder are each entitled to receive per share an aggregate amount of cash and the market value, as of the consummation date, of noncash consideration at least equal to the higher of the following:

a. The highest of: the market value per share on the announcement date with respect to the business combination, the market value per share on the interested stockholder's stock acquisition date, the highest price per share paid by the interested stockholder, including brokerage commissions, transfer taxes and soliciting dealers' fees, for shares of the same class or series within the 3 years immediately before and including the announcement date of the business combination, or the highest price per share paid by the interested stockholder, including brokerage commissions, transfer taxes and soliciting dealers' fees, for shares of the same class or series within the 3 years immediately before and including the interested stockholder's stock acquisition date; plus, in each case, interest compounded annually from the earliest date on which that highest per share acquisition price was paid or the per share market value was

determined, through the consummation date, at the rate for one-year U.S. treasury obligations from time to time in effect; less the aggregate amount of any cash and the market value, as of the dividend payment date, of any noncash dividends paid per share since that date, up to the amount of that interest.

b. The highest preferential amount per share, if any, to which the holders of shares of that class or series of stock are entitled upon the voluntary or involuntary liquidation of the resident domestic corporation, plus the aggregate amount of dividends declared or due which those holders are entitled to before payment of dividends on another class or series of stock, unless the aggregate amount of those dividends is included in the preferential amount.

2. The form of consideration to be received by holders of each particular class or series of outstanding stock in the business combination is in cash or, if the interested stockholder previously acquired shares of that class or series, the same form as the interested stockholder previously used to acquire the largest number of shares of that class or series.

(d) The business combination is a business combination as described in sub. (5)(a), (b), (c), (d) or (e).

(4) Determination of market value. For purposes of this section, the market value of stock or property other than cash or stock is determined as follows:

(a) In the case of stock by:

1. The highest closing sale price during the 30 days immediately before the date in question of a share of that class or series of stock on the composite tape for stocks listed on the New York stock exchange, or, if that class or series of stock is not quoted on the composite tape or if that class or series of stock is not listed on the New York stock exchange, on the principal U.S. securities exchange registered under the exchange act on which that class or series of stock is listed.

2. If that class or series of stock is not listed on an exchange described in subd. 1, the highest closing bid quotation for a

share of that class or series of stock during the 30 days immediately before the date in question on the national association of securities dealers automated quotation system, or any similar system then in use.

3. If no quotations described in subd. 2 are available, the fair market value on the date in question of a share of that class or series of stock as determined in good faith by the board of directors of the resident domestic corporation.

(b) In the case of property other than cash or stock, the fair market value of the property on the date in question as determined in good faith by the board of directors of the resident domestic corporation.

(4m) Presumption of control. For purposes of this section, a person's beneficial ownership of at least 10% of the voting power of corporation's outstanding voting stock creates a presumption that the person has control of the corporation.

(5) Exclusions from section. This section does not apply to any of the following:

a. Unless the articles of incorporation provide otherwise, a business combination of a resident domestic corporation with an interested stockholder if the resident domestic corporation did not have a class of voting stock registered or traded on a national securities exchange or registered under section 12(g) of the exchange act on the interested stockholder's stock acquisition date.

b. Unless the articles of incorporation provide otherwise, a business combination with an interested stockholder who was an interested stockholder immediately before September 10, 1987, unless subsequently the interested stockholder increased its beneficial ownership of the voting power of the outstanding voting stock of the resident domestic corporation to a proportion in excess of the proportion of voting power that the interested stockholder beneficially owned immediately before September 10, 1987, excluding an increase approved by the board of directors of the resident domestic corporation before the increase occurred.

c. A business combination of a resident domestic corporation with an interested stockholder which became an interested stockholder inadvertently, if the interested stockholder satisfies all of the following:

1. As soon as practicable divests itself of a sufficient amount of the voting stock of the resident domestic corporation so that the interested stockholder is no longer the beneficial owner of at least 10% of the voting power of the outstanding voting stock of the resident domestic corporation, or a subsidiary of that resident domestic corporation.

2. Would not at any time within the 3 years before the announcement date with respect to the business combination in question have been an interested stockholder except for the inadvertent acquisition.

(d) A business combination of a resident domestic corporation with an interested stockholder which was an interested stockholder immediately before September 10, 1987, and inadvertently increased its beneficial ownership of the voting power of the outstanding voting stock of the resident domestic corporation to a proportion in excess of the proportion of voting power that the interested stockholder beneficially owned immediately before September 10, 1987, if the interested stockholder divests itself of a sufficient amount of voting stock so that the interested stockholder is no longer the beneficial owner of a proportion of the voting power in excess of the proportion of voting power that the interested stockholder held immediately before September 10, 1987.

(e) A business combination of a resident domestic corporation if the business combination is governed by s. 180.04(6), with respect to acquiring or holding stock of a state bank or trust company, or by s. 186.31, 186.41, 215.36, 215.53, 215.73, 221.25, 221.58 or 223.11.

(6) Relationship of section to other laws. (a) The requirements of this section are in addition to the requirements of other applicable law, including the other provisions of this chapter, and any additional requirements contained in the arti-

cles of incorporation or bylaws of a resident domestic corporation with respect to business combinations.

(b) For purposes of applying this section, if any other provision of this chapter is inconsistent with, in conflict with or contrary to this section, that provision does not apply to the extent that it is inconsistent with, in conflict with or contrary to this section.

(7) Sunset. This section does not apply after September 10, 1991.

WILLIAMS ACT
15 U.S.C. § 78n(d)-(e)

Tender offer by owner of more than five per centum of class of securities; exceptions

(d)(1) It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to 78*l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78*l*(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in section 78m(d) of this title, and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors, and shall be filed with the Commission not later than the time copies of such material are first published or sent or given to security holders. Copies of all statements, in the form in which such material is furnished to security holders and the Commission, shall be sent to the issuer not later than the

date such material is first published or sent or given to any security holders.

(2) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for purposes of this subsection.

(3) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(4) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(5) Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors.

(6) Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to

the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders.

(7) Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

(8) The provisions of this subsection shall not apply to any offer for, or request or invitation for tenders of any security—

(A) if the acquisition of such security, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, would not exceed 2 per centum of that class;

(B) by the issuer of such security; or

(C) which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

Untrue statement of material fact or omission of fact with respect to tender offer

(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or

invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 89-1581 and 89-1712

AMANDA ACQUISITION CORPORATION,

Plaintiff-Appellant/Cross-Appellee,

v.

UNIVERSAL FOODS CORPORATION, *et al.*,

Defendants-Appellees/Cross-Appellants.

Appeals from the United States District Court
for the Eastern District of Wisconsin.
No. 88-C-1296—J.P. Stadtmueller, *Judge*.

ARGUED APRIL 17, 1989—DECIDED MAY 24, 1989

Before BAUER, *Chief Judge*, EASTERBROOK, *Circuit Judge*, and WILL, *Senior District Judge*.*

EASTERBROOK, *Circuit Judge*. States have enacted three generations of takeover statutes in the last 20 years. Illinois enacted a first-generation statute, which forbade acquisitions of any firm with substantial assets in Illinois unless a public official approved. We concluded that such a statute injures investors, is preempted by the Williams

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* Hon. Hubert L. Will, of the Northern District of Illinois, sitting by designation.

Act, and is unconstitutional under the dormant Commerce Clause. *MITE Corp. v. Dixon*, 633 F.2d 486 (7th Cir. 1980). The Supreme Court affirmed the judgment under the Commerce Clause, *Edgar v. MITE Corp.*, 457 U.S. 624, 643-46 (1982). Three Justices also agreed with our view of the Williams Act, *id.* at 634-40 (White, J., joined by Burger, C.J. & Blackmun, J.), while two disagreed, *id.* at 646-47 (Powell, J.), and 655 (Stevens, J.), and four did not address the subject.

Indiana enacted a second-generation statute, applicable only to firms incorporated there and eliminating governmental veto power. Indiana's law provides that the acquiring firm's shares lose their voting power unless the target's directors approve the acquisition or the shareholders not affiliated with either bidder or management authorize restoration of votes. We concluded that this statute, too, is inimical to investors' interests, preempted by the Williams Act, and unconstitutional under the Commerce Clause. *Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250 (7th Cir. 1986). This time the Supreme Court did not agree. It thought the Indiana statute consistent with both Williams Act and Commerce Clause. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987). Adopting Justice White's view of preemption for the sake of argument, *id.* at 81, the Court found no inconsistency between state and federal law because Indiana allowed the bidder to *acquire* the shares without hindrance. Such a law makes the shares less attractive, but it does not regulate the process of bidding. As for the Commerce Clause, the Court took Indiana's law to be regulation of internal corporate affairs, potentially beneficial because it would allow investors to avoid the "coercion" of two-tier bids and other tactics. 481 U.S. at 83, 91-93. Justices White, Blackmun, and Stevens disagreed with the analysis under the Commerce Clause, *id.* at 99-101; only Justice White disagreed with the conclusion about preemption, *id.* at 97-99.

Wisconsin has a third-generation takeover statute. Enacted after *CTS*, it postpones the kinds of transactions that often follow tender offers (and often are the reason for

making the offers in the first place). Unless the target's board agrees to the transaction in advance, the bidder must wait three years after buying the shares to merge with the target or acquire more than 5% of its assets. We must decide whether this is consistent with the Williams Act and Commerce Clause.

I

Amanda Acquisition Corporation is a shell with a single purpose: to acquire Universal Foods Corporation, a diversified firm incorporated in Wisconsin and traded on the New York Stock Exchange. Universal is covered by Wisconsin's anti-takeover law. Amanda is a subsidiary of High Voltage Engineering Corp., a small electronics firm in Massachusetts. Most of High Voltage's equity capital comes from Berisford Capital PLC, a British venture capital firm, and Hyde Park Partners L.P., a partnership affiliated with the principals of Berisford. Chase Manhattan Bank has promised to lend Amanda 50% of the cost of the acquisition, secured by the stock of Universal.

In mid-November 1988 Universal's stock was trading for about $25 per share. On December 1 Amanda commenced a tender offer at $30.50, to be effective if at least 75% of the stock should be tendered.[1] This all-cash, all-shares offer has been increased by stages to $38.00.[2] Amanda's financing is contingent on a prompt merger with Universal

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[1] Wisconsin has, in addition to §180.726, a statute modeled on Indiana's, providing that an acquiring firm's shares lose their votes, which may be restored under specified circumstances. Wis. Stat. §180.25(9). That law accounts for the 75% condition, but it is not pertinent to the questions we resolve.

[2] Universal contends that an increase after the district court's opinion makes the case moot, or at least requires a remand. It does not. The parties remain locked in combat. Price has no effect on the operation of the Wisconsin law, and as that is the sole issue we shall decide there is no need to remand for further proceedings.

if the offer succeeds, so the offer is conditional on a judicial declaration that the law is invalid. (It is also conditional on Universal's redemption of poison pill stock. For reasons that we discuss below, it is unnecessary to discuss the subject in detail.)

No firm incorporated in Wisconsin and having its headquarters, substantial operations, or 10% of its shares or shareholders there may "engage in a business combination with an interested stockholder . . . for 3 years after the interested stockholder's stock acquisition date unless the board of directors of the [Wisconsin] corporation has approved, before the interested stockholder's stock acquisition date, that business combination or the purchase of stock", Wis. Stat. §180.726(2). An "interested stockholder" is one owning 10% of the voting stock, directly or through associates (anyone acting in concert with it), §180.726(1)(j). A "business combination" is a merger with the bidder or any of its affiliates, sale of more than 5% of the assets to bidder or affiliate, liquidation of the target, or a transaction by which the target guarantees the bidder's or affiliates debts or passes tax benefits to the bidder or affiliate, §180.726(1)(e). The law, in other words, provides for almost hermetic separation of bidder and target for three years after the bidder obtains 10% of the stock—unless the target's board consented before then. No matter how popular the offer, the ban applies: obtaining 85% (even 100%) of the stock held by non-management shareholders won't allow the bidder to engage in a business combination, as it would under Delaware law. See *BNS, Inc. v. Koppers Co.*, 683 F. Supp. 458 (D. Del. 1988); *RP Acquisition Corp. v. Staley Continental, Inc.*, 686 F. Supp. 476 (D. Del. 1988); *City Capital Associates L.P. v. Interco, Inc.*, 696 F. Supp. 1551 (D. Del.), affirmed, 860 F.2d 60 (3d Cir. 1988). Wisconsin firms cannot opt out of the law, as may corporations subject to almost all other state takeover statutes. In Wisconsin it is management's approval in advance, or wait three years. Even when the time is up, the bidder needs the approval of a majority of the remaining investors, without any provision disqualifying

shares still held by the managers who resisted the transaction, §180.726(3)(b).[3] The district court found that this statute "effectively eliminates hostile leveraged buyouts". As a practical matter, Wisconsin prohibits any offer contingent on a merger between bidder and target, a condition attached to about 90% of contemporary tender offers.

Amanda filed this suit seeking a declaration that this law is preempted by the Williams Act and inconsistent with the Commerce Clause. It added a pendent claim that the directors' refusal to redeem the poison-pill rights violates their fiduciary duties to Universal's shareholders. The district court declined to issue a preliminary injunction. 708 F. Supp. 984 (E.D. Wis. 1989). It concluded that the statute is constitutional and not preempted, and that under Wisconsin law (which the court believed would follow Delaware's) directors are entitled to prevent investors from accepting tender offers of which the directors do not approve.[4] Amanda prevailed on one issue,

[3] Acquirors can avoid this requirement by buying out the remaining shareholders at a price defined by §180.726(3)(c), but this is not a practical option.

[4] The district court's explanation of its holding is more limited, because it said that the directors might have foreseen three "threats" in this all-cash, all-shares premium offer: a threat that the merger would not occur, leaving some investors locked into a minority position; a threat that the papers filed under the Williams Act "might" contain false information, and a "threat to the corporation itself" in the sense that Amanda might change Universal's business plans. Such "threats" are present in all tender offers. If they are enough to justify defensive tactics, then managers are entitled to "just say no" to tender offers. Nothing in this opinion endorses the district court's rationale concerning these "threats", which is in tension with recent Delaware cases. *City Capital Associates L.P. v. Interco, Inc.*, 551 A.2d 787 (Del. Ch. 1988); *Grand Metropolitan, PLC v. Pillsbury Co.*, 1988 Del. Ch. LEXIS 158 (Del. Ch. 1988); *MAI Basic Four, Inc. v. Prime Computer, Inc.*, 1988 Del. Ch. LEXIS 161 (Del. Ch. 1988). In responding to a tender offer directors must exercise "the most scrupulous adherence to ordinary standards of fairness in the interest of promoting

(Footnote continued on following page)

however: the court held that Universal does not have a private right of action to enforce the margin regulations issued by the Federal Reserve Board, and it therefore declined to consider Universal's argument that Amanda had arranged to borrow more than 50% of the cost of its bid.

As a practical matter, the decision denying preliminary relief ends the case. The parties treat their appeals as if taken from the conclusive denial of relief; so shall we. The financial stakes on both sides cancel out, and the question becomes who is right on the merits. *CTS*, 794 F.2d at 252; see also *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 903-05 (7th Cir. 1989). The parties ask us to decide whether Universal has a private right of action to enforce the margin rules, whether Universal's directors violated their fiduciary duties under Delaware law (or Wisconsin law if it differs) in refusing to redeem the poison pill rights, and whether §180.726 is consistent with the Constitution and federal law.

II

Courts try to avoid constitutional adjudication. There is no escape for us today, however. Even if we were to conclude that Universal has a private right of action and that its board acted within its rights in refusing to redeem the poison pill, we would have to reach the constitutional question. Amanda is entitled to attack each hurdle in its path. Although the poison pill *might* be an insuperable

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[4] *continued*

the highest values reasonably attainable for the stockholders' benefit." *Mills Acquisition Co v. Macmillan, Inc.*, 1989 Del. LEXIS 149, 4 (Del. 1989). A policy denying investors the opportunity to accept a substantial premium, based on remote "threats", is not easy to square with the law of Delaware. See also Ronald J. Gilson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 Bus. Law. 247, 256-60, 267-73 (1989).

obstacle if the statute were held invalid, Amanda may gain from having one fewer stumbling block, which gives it standing to protest the statute independently of the pill. See *Larson v. Valente*, 456 U.S. 228, 238-43 (1982); *Tyson Foods, Inc. v. McReynolds*, 865 F.2d 99, 101 (6th Cir. 1989). The reverse is not true, however. At oral argument counsel for Amanda said that if the statute is within Wisconsin's powers, then its offer is doomed. So starting with the statute holds out the prospect of avoiding some issues, while starting with private rights of action or directors' duties would not enable us to avoid the constitutional question. If we conclude that §180.726 is within Wisconsin's power, the offer is defunct, and it would be unnecessary to decide whether targets have a private right of action to enforce the margin rules or whether Universal's directors had to redeem the poison pill. We begin, therefore, by considering whether Wis. Stat. §180.726 conflicts with the Williams Act or the Commerce Clause.

A

If our views of the wisdom of state law mattered, Wisconsin's takeover statute would not survive. Like our colleagues who decided *MITE* and *CTS*, we believe that antitakeover legislation injures shareholders.[5] *MITE*, 633 F.2d

[5] Because both the district court and the parties—like the Williams Act—examine tender offers from the perspective of equity investors, we employ the same approach. States could choose to protect "constituencies" other than stockholders. Creditors, managers, and workers invest human rather than financial capital. But the limitation of our inquiry to equity investors does not affect the analysis, because no evidence of which we are aware suggests that bidders confiscate workers' and other participants' investments to any greater degree than do incumbents—who may (and frequently do) close or move plants to follow the prospect of profit. Joseph A. Grundfest, a Commissioner of the SEC, showed in *Job Loss and Takeovers*, address to University of Toledo College of Law, Mar. 11, 1988, that acquisitions have no logical (or demonstrable) effect on employment. See also Brown & Medoff, *The Im-*

(Footnote continued on following page)

at 496-98 and 457 U.S. at 643-44; *CTS*, 794 F.2d at 253-55. Managers frequently realize gains for investors via voluntary combinations (mergers). If gains are to be had, but managers balk, tender offers are investors' way to go over managers' heads. If managers are not maximizing the firm's value—perhaps because they have missed the possibility of a synergistic combination, perhaps because they are clinging to divisions that could be better run in other hands, perhaps because they are just not the best persons for the job—a bidder that believes it can realize more of the firm's value will make investors a higher offer. Investors tender; the bidder gets control and changes things. Michael Bradley, Anand Desai & E. Han Kim, *Synergistic Gains from Corporate Acquisitions and Their Division Between the Stockholders of Target and Acquiring Firms*, 21 J. Fin. Econ. 3 (1988). The prospect of monitoring by would-be bidders, and an occasional bid at a premium, induces managers to run corporations more efficiently and replaces them if they will not.

Premium bids reflect the benefits for investors. The price of a firm's stock represents investors' consensus estimate of the value of the shares under current and anticipated conditions. Stock is worth the present value of anticipated future returns—dividends and other distributions. Tender offers succeed when bidders offer more. Only when the bid exceeds the value of the stock (however investors compute value) will it succeed. A statute that precludes investors from receiving or accepting a premium offer makes them worse off. It makes the economy worse off too, because the higher bid reflects the better use to

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[5] *continued*

pact of Firm Acquisitions on Labor, in *Corporate Takeovers: Causes and Consequences* 9 (A. Auerbach ed. 1988); Roberta Romano, *The Future of Hostile Takeovers: Legislation and Public Opinion*, 57 U. Cin. L. Rev. 457 (1988); C. Steven Bradford, *Protecting Shareholders from Themselves? A Policy and Constitutional Review of a State Takeover Statute*, 67 Neb. L. Rev. 459, 529-34 (1988).

which the bidder can put the target's assets. (If the bidder can't improve the use of the assets, it injures itself by paying a premium.)

Universal, making an argument common among supporters of anti-takeover laws, contends that its investors do not appreciate the worth of its business plans, that its stock is trading for too little, and that if investors tender reflexively they injure themselves. If only they would wait, Universal submits, they would do better under current management. A variant of the argument has it that although smart investors know that the stock is underpriced, many investors are passive and will tender; even the smart investors then must tender to avoid doing worse on the "back end" of the deal. State laws giving management the power to block an offer enable the managers to protect the investors from themselves.

Both versions of this price-is-wrong argument imply: (a) that the stock of firms defeating offers later appreciates in price, topping the bid, thus revealing the wisdom of waiting till the market wises up; and (b) that investors in firms for which no offer is outstanding gain when they adopt devices so that managers may fend off unwanted offers (or states adopt laws with the same consequence). Efforts to verify these implications have failed. The best available data show that if a firm fends off a bid, its profits decline, and its stock price (adjusted for inflation and market-wide changes) never tops the initial bid, even if it is later acquired by another firm. Gregg A. Jarrell, James A. Brickley & Jeffrey M. Netter, *The Market for Corporate Control: The Empirical Evidence Since 1980*, 2 J. Econ. Perspectives 49, 55 (1988) (collecting studies); John Pound, *The Information Effects of Takeover Bids and Resistance*, 22 J. Fin. Econ. 207 (1988). Stock of firms adopting poison pills falls in price, as does the stock of firms that adopt most kinds of anti-takeover amendments to their articles of incorporation. Jarrell, Brickley & Netter, 2 J. Econ. Perspectives at 58-65 (collecting studies); Michael C. Jensen, *Takeovers: Their Causes and Consequences*, 2 J. Econ. Perspectives 21, 25-28, 41-45 (1988);

Michael Ryngaert, *The Effect of Poison Pill Securities on Shareholder Wealth*, 20 J. Fin. Econ. 377 (1988); cf. John Pound, *The Effects of Antitakeover Amendments on Takeover Activity: Some Direct Evidence*, 30 J.L. & Econ. 353 (1987). Studies of laws similar to Wisconsin's produce the same conclusion: share prices of firms incorporated in the state drop when the legislation is enacted. Jonathan M. Karpoff & Paul H. Malatesta, *The Wealth Effects of Second Generation State Takeover Legislation*, University of Washington Graduate School of Business Working Paper (Dec. 22, 1988).

Although a takeover-*proof* firm leaves investors at the mercy of incumbent managers (who may be mistaken about the wisdom of their business plan even when they act in the best of faith), a takeover-*resistant* firm may be able to assist its investors. An auction may run up the price, and delay may be essential to an auction. Auctions transfer money from bidders to targets, and diversified investors would not gain from them (their left pocket loses what the right pocket gains); diversified investors would lose from auctions if the lower returns to bidders discourage future bids. But from targets' perspectives, once a bid is on the table an auction may be the best strategy. The full effects of auctions are hard to unravel, sparking scholarly debate.[6] Devices giving managers some ability to orchestrate investors' responses, in order to avoid panic

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[6] Compare Lucian Arye Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 Harv. L. Rev. 1693 (1985), and Ronald J. Gilson, *Seeking Competitive Bids versus Pure Passivity in Tender Offer Defense*, 35 Stan. L. Rev. 51 (1982), with Alan Schwartz, *Search Theory and the Tender Offer Auction*, 2 J.L., Econ. & Org. 229 (1986), and Sanford J. Grossman & Oliver D. Hart, *Takeover Bids, the Free-Rider Problem and the Theory of the Corporation*, 11 Bell J. Econ. 42 (1980). For the most recent round compare Alan Schwartz, *The Fairness of Tender Offer Prices in Utilitarian Theory*, 17 J. Legal Stud. 165 (1988), with Lucian Arye Bebchuk, *The Sole Owner Standard for Takeover Policy*, *id.* at 197, with Schwartz, *The Sole Owner Standard Reviewed*, *id.* at 231.

tenders in response to front-end-loaded offers, also could be beneficial, as the Supreme Court emphasized in *CTS*, 481 U.S. at 92-93. ("Could be" is an important qualifier; even from a perspective limited to targets' shareholders given a bid on the table, it is important to know whether managers use this power to augment bids or to stifle them, and whether courts can tell the two apart.)

State anti-takeover laws do not serve these ends well, however. Investors who prefer to give managers the discretion to orchestrate responses to bids may do so through "fair-price" clauses in the articles of incorporation and other consensual devices. Other firms may choose different strategies. A law such as Wisconsin's does not add options to firms that would like to give more discretion to their managers; instead it destroys the possibility of divergent choices. Wisconsin's law applies even when the investors prefer to leave their managers under the gun, to allow the market full sway. Karpoff and Malatesta found that state anti-takeover laws have little or no effect on the price of shares if the firm already has poison pills (or related devices) in place, but strongly negative effects on price when firms have no such contractual devices. To put this differently, state laws have bite only when investors, given the choice, would deny managers the power to interfere with tender offers (maybe already *have* denied managers that power). See also Roberta Romano, *The Political Economy of Takeover Statutes*, 73 Va. L. Rev. 111, 128-31 (1987).

B

Skepticism about the wisdom of a state's law does not lead to the conclusion that the law is beyond the state's power, however. We have not been elected custodians of investors' wealth. States need not treat investors' welfare as their summum bonum. Perhaps they choose to protect managers' welfare instead, or believe that the current economic literature reaches an incorrect conclusion and that despite appearances takeovers injure investors in the long

run. Unless a federal statute or the Constitution bars the way, Wisconsin's choice must be respected.

Amanda relies on the Williams Act of 1968, incorporated into §§ 13(d), (e) and 14(d)-(f) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78m(d), (e), 78n(d)-(f). The Williams Act regulates the conduct of tender offers. Amanda believes that Congress created an entitlement for investors to receive the benefit of tender offers, and that because Wisconsin's law makes tender offers unattractive to many potential bidders, it is preempted. See *MITE*, 633 F.2d at 490-99, and Justice White's views, 457 U.S. at 630-40.

Preemption has not won easy acceptance among the Justices for several reasons. First there is §28(a) of the '34 Act, 15 U.S.C. §78bb(a), which provides that "[n]othing in this chapter shall affect the jurisdiction of the securities commission . . . of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder." Although some of the SEC's regulations (particularly the one defining the commencement of an offer) conflict with some state takeover laws, the SEC has not drafted regulations concerning mergers with controlling shareholders, and the Act itself does not address the subject. States have used the leeway afforded by §28(a) to carry out "merit regulation" of securities—"blue sky" laws that allow securities commissioners to forbid sales altogether, in contrast with the federal regimen emphasizing disclosure. So §28(a) allows states to stop some transactions federal law would permit, in pursuit of an approach at odds with a system emphasizing disclosure and investors' choice. Then there is the traditional reluctance of federal courts to infer preemption of "state law in areas traditionally regulated by the States", *California v. ARC America Corp.*, 109 S. Ct. 1661, 1665 (1989); see also, e.g., *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 716 (1985); *Air Line Pilots Ass'n v. UAL Corp.*, No. 88-3308 (7th Cir. May 4, 1989), slip op. 14-15. States have regulated corporate affairs, including

mergers and sales of assets, since before the beginning of the nation.

Because Justice White's views of the Williams Act did not garner the support of a majority of the Court in *MITE*, we reexamined that subject in *CTS* and observed that the best argument for preemption is the Williams Act's "neutrality" between bidder and management, a balance designed to leave investors free to choose. This is not a confident jumping-off point, though: "Of course it is a big leap from saying that the Williams Act does not itself exhibit much hostility to tender offers to saying that it implicitly forbids states to adopt more hostile regulations, but this leap was taken by the Supreme Court plurality and us in *MITE* and by every court to consider the question since. . . . [W]hatever doubts of the Williams' Act preemptive intent we might entertain as an original matter are stifled by the weight of precedent." 794 F.2d at 262. The rough treatment our views received from the Court—only Justice White supported the holding on preemption—lifts the "weight of precedent".

There is a big difference between what Congress *enacts* and what it *supposes* will ensue. Expectations about the consequences of a law are not themselves law. To say that Congress wanted to be neutral between bidder and target—a conclusion reached in many of the Court's opinions, e.g., *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977)—is not to say that it also forbade the states to favor one of these sides. Every law has a stopping point, likely one selected because of a belief that it would be unwise (for now, maybe forever) to do more. *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987); *Covalt v. Carey Canada Inc.*, 860 F.2d 1434, 1439 (7th Cir. 1988). Nothing in the Williams Act says that the federal compromise among bidders, targets' managers, and investors is the only permissible one. See Daniel R. Fischel, *From MITE to CTS: State Anti-Takeover Statutes, the Williams Act, the Commerce Clause, and Insider Trading*, 1987 Sup. Ct. Rev. 47, 71-74. Like the majority of the Court in *CTS*, however, we stop short of the precipice. 481 U.S. at 78-87.

The Williams Act regulates the *process* of tender offers: timing, disclosure, proration if tenders exceed what the bidder is willing to buy, best-price rules. It slows things down, allowing investors to evaluate the offer and management's response. Best-price, proration, and short-tender rules ensure that investors who decide at the end of the offer get the same treatment as those who decide immediately, reducing pressure to leap before looking.[7] After complying with the disclosure and delay requirements, the bidder is free to take the shares. *MITE* held invalid a state law that increased the delay and, by authorizing a regulator to nix the offer, created a distinct possibility that the bidder would be unable to buy the stock (and the holders to sell it) despite compliance with federal law. Illinois tried to regulate the process of tender offers, contradicting in some respects the federal rules. Indiana, by contrast, allowed the tender offer to take its course as the Williams Act specified but "sterilized" the acquired shares until the remaining investors restored their voting rights. Congress said nothing about the voting power of shares acquired in tender offers. Indiana's law reduced the benefits the bidder anticipated from the acquisition but left the process alone. So the Court, although accepting Justice White's views for the purpose of argument, held that Indiana's rules do not conflict with the federal norms.

CTS observed that laws affecting the voting power of acquired shares do not differ in principle from many other rules governing the internal affairs of corporations. Laws requiring staggered or classified boards of directors delay the transfer of control to the bidder; laws requiring supermajority vote for a merger may make a transaction less attractive or impossible. 481 U.S. at 85-86. Yet these are not preempted by the Williams Act, any more than state

[7] To reduce is not to eliminate. Investors' options include selling to arbitrageurs in the market. This price fluctuates daily and may drop suddenly if the prospects of the bid's success dim.

laws concerning the *effect* of investors' votes are preempted by the portions of the Exchange Act, 15 U.S.C. §78n(a)-(c), regulating the process of soliciting proxies. Federal securities laws frequently regulate process while state corporate law regulates substance. Federal proxy rules demand that firms disclose many things, in order to promote informed voting. Yet states may permit or compel a supermajority rule (even a unanimity rule) rendering it all but impossible for a particular side to prevail in the voting. See Robert Charles Clark, *Corporate Law* §9.1.3 (1986). Are the state laws therefore preempted? How about state laws that allow many firms to organize without traded shares? Universities, hospitals, and other charities have self-perpetuating boards and cannot be acquired by tender offer. Insurance companies may be organized as mutuals, without traded shares; retailers often organize as co-operatives, without traded stock; some decently large companies (large enough to be "reporting companies" under the '34 Act) issue stock subject to buy-sell agreements under which the investors cannot sell to strangers without offering stock to the firm at a formula price; Ford Motor Co. issued non-voting stock to outside investors while reserving voting stock for the family, thus preventing outsiders from gaining control (dual-class stock is becoming more common); firms issue and state law enforces poison pills. All of these devices make tender offers unattractive (even impossible) and greatly diminish the power of proxy fights, success in which often depends on buying votes by acquiring the equity to which the vote is attached. See Douglas H. Blair, Devra L. Golbe & James M. Gerard, *Unbundling the Voting Rights and Profit Claims of Common Shares*, 97 J. Pol. Econ. 420 (1989). None of these devices could be thought preempted by the Williams Act or the proxy rules. If they are not preempted, neither is Wis. Stat. §180.726.

Any bidder complying with federal law is free to acquire shares of Wisconsin firms on schedule. Delay in completing a second-stage merger may make the target less attractive, and thus depress the price offered or even lead

to an absence of bids; it does not, however, alter any of the procedures governed by federal regulation. Indeed Wisconsin's law does not depend in any way on how the acquiring firm came by its stock: open-market purchases, private acquisitions of blocs, and acquisitions via tender offers are treated identically. Wisconsin's law is no different in effect from one saying that for the three years after a person acquires 10% of a firm's stock, a unanimous vote is required to merge. Corporate law once had a generally-applicable unanimity rule in major transactions,[8] a rule discarded because giving every investor the power to block every reorganization stopped many desirable changes. (Many investors could use their "hold-up" power to try to engross a larger portion of the gains, creating a complex bargaining problem that often could not be solved.) Wisconsin's more restrained version of unanimity also may block beneficial transactions, but not by tinkering with any of the procedures established in federal law.

Only if the Williams Act gives investors a right to be the beneficiary of offers could Wisconsin's law run afoul of the federal rule. No such entitlement can be mined out of the Williams Act, however. *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1 (1985), holds that the cancellation of a pending offer because of machinations between bidder and target does not deprive investors of their due under the Williams Act. The Court treated §14(e) as a disclosure law, so that investors could make informed decisions; it follows that events leading bidders to cease their quest do not conflict with the Williams Act any more than a state law leading a firm not to issue new securities could conflict with the Securities Act of 1933. See also *Panter v. Marshall Field & Co.*, 646 F.2d 271, 283-85 (7th Cir.

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[8] See William J. Carney, *Fundamental Corporate Changes, Minority Shareholders, and Business Purposes*, 1980 Am. Bar Found. Res. J. 69, 77-97; Bayless Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 Yale L.J. 223, 226-30 (1962), for two descriptions of the rule, both at common law and in the early state corporate codes.

1981); *Lewis v. McGraw*, 619 F.2d 192 (2d Cir. 1980), both holding that the evaporation of an opportunity to tender one's shares when a defensive tactic leads the bidder to withdraw the invitation does not violate the Williams Act. Investors have no right to receive tender offers. More to the point—since Amanda sues as bidder rather than as investor seeking to sell—the Williams Act does not create a right to profit from the business of making tender offers. It is not attractive to put bids on the table for Wisconsin corporations, but because Wisconsin leaves the process alone once a bidder appears, its law may co-exist with the Williams Act.

C

The Commerce Clause, Art. I §8 cl. 3 of the Constitution, grants Congress the power "[t]o regulate Commerce . . . among the several States". For many decades the Court took this to be what it says: a grant to Congress with no implications for the states' authority to act when Congress is silent. See David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years* 171-83, 222-36 (1985) (discussing cases); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 Duke L.J. 569. Limitations came from provisions, such as the Contract Clause, Art. I §10 cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts"), expressly denying the states certain powers. The Contract Clause has been held to curtail states' authority over corporations, see *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), and it may have something to say about states' ability to limit the transferability of shares after they have been issued. See Henry N. Butler & Larry E. Ribstein, *State Anti-Takeover Statutes and the Contract Clause*, 57 U. Cin. L. Rev. 611 (1988). Broad dicta in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852), eventually led to holdings denying states the power to regulate interstate commerce directly or discriminatorily, or to take steps that had unjustified consequences in

other states. Meanwhile the Court began to treat the Contract Clause as if it said that "No State shall pass any *unwise* Law impairing the Obligation of Contracts", so that divergent clauses have become homogenized. *Chicago Board of Realtors, Inc. v. Chicago*, 819 F.2d 732, 742-45 (7th Cir. 1987).

When state law discriminates against interstate commerce expressly—for example, when Wisconsin closes its border to butter from Minnesota—the negative Commerce Clause steps in. The law before us is not of this type: it is neutral between inter-state and intra-state commerce. Amanda therefore presses on us the broader, all-weather, be-reasonable vision of the Constitution. Wisconsin has passed a law that unreasonably injures investors, most of whom live outside of Wisconsin, and therefore it *has* to be unconstitutional, as Amanda sees things. Although *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), sometimes is understood to authorize such general-purpose balancing, a closer examination of the cases may support the conclusion that the Court has looked for discrimination rather than for baleful effects. See Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091 (1986); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425 (1982). At all events, although *MITE* employed the balancing process described in *Pike* to deal with a statute that regulated all firms having "contacts" with the state, *CTS* did not even cite that case when dealing with a statute regulating only the affairs of a firm incorporated in the state, and Justice Scalia's concurring opinion questioned its application. 481 U.S. at 95-96. The Court took a decidedly confined view of the judicial role: "We are not inclined 'to second-guess the empirical judgments of lawmakers concerning the utility of legislation,' *Kassel v. Consolidated Freightways Corp.*, 450 U.S. [662] at 679 (BRENNAN, J., concurring in judgment)." 481 U.S. at 92. Although the scholars whose writings we cited in Part II.A conclude that laws such as Wisconsin's injure investors, Wisconsin is entitled to give a

different answer to this empirical question—or to decide that investors' interests should be sacrificed to protect managers' interests or promote the stability of corporate arrangements.

Illinois's law, held invalid in *MITE*, regulated sales of stock elsewhere. Illinois tried to tell a Texas owner of stock in a Delaware corporation that he could not sell to a buyer in California. By contrast, Wisconsin's law, like the Indiana statute sustained by *CTS*, regulates the internal affairs of firms incorporated there. Investors may buy or sell stock as they please. Wisconsin's law differs in this respect not only from that of Illinois but also from that of Massachusetts, which forbade any transfer of shares for one year after the failure to disclose any material fact, a flaw that led the First Circuit to condemn it. *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 847-48 (1st Cir. 1988).[9]

Buyers of stock in Wisconsin firms may exercise full rights as investors, taking immediate control. No interstate transaction is regulated or forbidden. True, Wisconsin's law makes a potential buyer less willing to buy (or depresses the bid), but this is equally true of Indiana's rule. Many other rules of corporate law—supermajority voting requirements, staggered and classified boards, and so on—have similar or greater effects on some persons' willingness to purchase stock. *CTS*, 481 U.S. at 89-90. States could ban mergers outright, with even more powerful consequences. *Louisville & Nashville R.R. v. Kentucky*, 161 U.S. 677, 701-04 (1896); see also *Kansas City, Memphis & Birmingham R.R. v. Stiles*, 242 U.S. 111, 117 (1916); *Ashley v. Ryan*, 153 U.S. 436, 443 (1894). Wisconsin did not allow mergers among firms chartered there

[9] The name should ring a bell. Hyde Park Partners was trying to acquire High Voltage Engineering! As a result of the First Circuit's decision, it did. Now High Voltage as parent of Amanda is trying to do to Universal what Hyde Park did to it. Ironies do not always come full circle, however.

until 1947. We doubt that it was violating the Commerce Clause all those years. Cf. Edmund W. Kitch, *Regulation and the American Common Market, in Regulation, Federalism, and Interstate Commerce* 7 (A. Dan Tarlock ed. 1981). Every rule of corporate law affects investors who live outside the state of incorporation, yet this has never been thought sufficient to authorize a form of cost-benefit inquiry through the medium of the Commerce Clause.

Wisconsin, like Indiana, is indifferent to the domicile of the bidder. A putative bidder located in Wisconsin enjoys no privilege over a firm located in New York. So too with investors: all are treated identically, regardless of residence. Doubtless most bidders (and investors) are located outside Wisconsin, but unless the law discriminates according to residence this alone does not matter. *CTS*, 481 U.S. at 87-88; *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36-37 (1980); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 177 (1978). Every state's regulation of domestic trade (potentially) affects those who live elsewhere but wish to sell their wares within the state. A law making suppliers of drugs absolutely liable for defects will affect the conduct (and wealth) of Eli Lilly & Co., an Indiana firm, and the many other pharmaceutical houses, all located in other states, yet Wisconsin has no less power to set and change tort law than do states with domestic drug manufacturers. "Because nothing in the [Wisconsin] Act imposes a greater burden on out-of-state offerors than it does on similarly situated [Wisconsin] offerors, we reject the contention that the Act discriminates against interstate commerce." *CTS*, 481 U.S. at 88. For the same reason, the Court long ago held that state blue sky laws comport with the Commerce Clause. *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917); *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917); *Merrick v. N.W. Halsey & Co.*, 242 U.S. 568 (1917). Blue sky laws may bar Texans from selling stock in Wisconsin, but they apply equally to local residents' attempts to sell. That their application blocks a form of commerce altogether does not strip the states of power.

Wisconsin could exceed its powers by subjecting firms to inconsistent regulation. Because §180.726 applies only to a subset of firms incorporated in Wisconsin, however, there is no possibility of inconsistent regulation. Here, too, the Wisconsin law is materially identical to Indiana's. *CTS*, 481 U.S. at 88-89. This leaves only the argument that Wisconsin's law hinders the flow of interstate trade "too much". *CTS* dispatched this concern by declaring it inapplicable to laws that apply only to the internal affairs of firms incorporated in the regulating state. 481 U.S. at 89-94. States may regulate corporate transactions as they choose without having to demonstrate under an unfocused balancing test that the benefits are "enough" to justify the consequences.[10]

To say that states have the power to enact laws whose costs exceed their benefits is not to say that investors should kiss their wallets goodbye. States compete to offer corporate codes attractive to firms. Managers who want to raise money incorporate their firms in the states that offer the combination of rules investors prefer. Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. Legal Studies 251 (1977); Fischel, *supra*, 1987 Sup. Ct. Rev. at 74-84. Laws that in the short run injure investors and protect managers will in the longer run make the state less attractive to firms that need to raise new capital. If the law is "protectionist", the protected class is the existing body of managers (and other workers), suppliers, and so on, which bears no necessary relation to state boundaries. States regulating the affairs of domestic corporations cannot in

[10] The First Circuit considered in *Hyde Park Partners* the possibility that *CTS* had declared balancing of inter- and intra-state effects under *Pike* unnecessary when the state regulates a firm's internal affairs. 839 F.2d at 844-47. To be on the safe side, that court weighed effects of the Massachusetts law and found that most of its provisions were too inconsequential to be unconstitutional. Wisconsin's law is made of sterner stuff, and we can't avoid the issue so easily.

the long run injure anyone but themselves. Professor Fischel makes the point, 1987 Sup. Ct. Rev. at 84:

> In the short run, states can enact welfare-decreasing legislation that imposes costs on residents of other states. State anti-takeover statutes . . . may be paradigm examples of cost-exporting legislation that is enacted in response to lobbying pressure by in-state constituents. [The managers who gain from the law live in-state; the investors who lose may live elsewhere.] In the long run, however, states have no ability to export costs to non-resident investors. When entrepreneurs want to raise capital for a corporate venture, they must decide where to incorporate. The choice of where to incorporate in turn affects the price investors are willing to pay for shares. And because shares of stock have many perfect substitutes which offer the same risk-return combinations, it is impossible for the entrepreneur to pass on the effects of the law to investors. . . . Nor can a state export costs to the founding entrepreneur since corporations can be incorporated anywhere, regardless of the firm's physical location. States that enact laws that are harmful to investors will cause entrepreneurs to incorporate elsewhere.

The long run takes time to arrive, and it is tempting to suppose that courts could contribute to investors' welfare by eliminating laws that impose costs in the short run. See Gregg A. Jarrell, *State Anti-Takeover Laws and the Efficient Allocation of Corporate Control: An Economic Analysis of Edgar v. MITE Corp.*, 2 Sup. Ct. Econ. Rev. 111 (1983). The price of such warfare, however, is a reduction in the power of competition among states. Courts seeking to impose "good" rules on the states diminish the differences among corporate codes and dampen competitive forces. Too, courts may fail in their quest. How do judges know which rules are best? Often only the slow forces of competition reveal that information. Early economic studies may mislead, or judges (not trained as social

scientists) may misinterpret the available data or act precipitously. Our Constitution allows the states to act as laboratories; slow migration (or national law on the authority of the Commerce Clause) grinds the failures under. No such process weeds out judicial errors, or decisions that, although astute when rendered, have become anachronistic in light of changes in the economy. Judges must hesitate for these practical reasons—and not only because of limits on their constitutional competence—before trying to "perfect" corporate codes.

The three district judges who have considered and sustained Delaware's law delaying mergers did so in large measure because they believed that the law left hostile offers "a meaningful opportunity for success". *BNS, Inc. v. Koppers Co.*, 683 F. Supp. at 469. See also *RP Acquisition Corp.*, 686 F. Supp. at 482-84, 488; *City Capital Associates*, 696 F. Supp. at 1555. Delaware allows a merger to occur forthwith if the bidder obtains 85% of the shares other than those held by management and employee stock plans. If the bid is attractive to the bulk of the unaffiliated investors, it succeeds. Wisconsin offers no such opportunity, which Amanda believes is fatal.

Even in Wisconsin, though, options remain. Defenses impenetrable to the naked eye may have cracks. Poison pills are less fatal in practice than in name (some have been swallowed willingly), and corporate law contains self-defense mechanisms. Investors concerned about stock-watering often arranged for firms to issue pre-emptive rights, entitlements for existing investors to buy stock at the same price offered to newcomers (often before the newcomers had a chance to buy in). Poison pills are dilution devices, and so pre-emptive rights ought to be handy countermeasures.[11] So too there are countermeasures to statutes de-

[11] Imagine a series of Antidote rights, issued by would-be bidding firms, that detach if anyone exercises flip-over rights to purchase the bidder's stock at a discount. Antidote rights would entitle the bidder's investors, *other than those who exercise flip-over rights*,

(Footnote continued on following page)

ferring mergers. The cheapest is to lower the bid to reflect the costs of delay. Because every potential bidder labors under the same drawback, the firm placing the highest value on the target still should win. Or a bidder might take down the stock and pledge it (or its dividends) as security for any loans. That is, the bidder could operate the target as a subsidiary for three years. The corporate world is full of partially owned subsidiaries. If there is gain to be had from changing the debt-equity ratio of the target, that can be done consistent with Wisconsin law. The prospect of being locked into place as holders of illiquid minority positions would cause many persons to sell out, and the threat of being locked in would cause many managers to give assent in advance, as Wisconsin allows. (Or bidders might demand that directors waive the protections of state law, just as Amanda believes that the directors' fiduciary duties compel them to redeem the poison pill rights.) Many bidders would find lock-in unattractive because of the potential for litigation by minority investors, and the need to operate the firm as a subsidiary might foreclose savings or synergies from merger. So none of these options is a perfect substitute for immediate merger, but each is a crack in the defensive wall allowing some value-increasing bids to proceed.

At the end of the day, however, it does not matter whether these countermeasures are "enough". The Commerce Clause does not demand that states leave bidders a "meaningful opportunity for success". Maryland enacted a law that absolutely banned vertical integration in the oil business. No opportunities, "meaningful" or otherwise, remained to firms wanting to own retail outlets. *Exxon*

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[11] *continued*

to purchase the bidder's stock at the same discount available to investors exercising flip-over rights. Antidotes for flip-in rights also could be issued. In general, whenever one firm can issue rights allowing the purchase of cheap stock, another firm can issue the equivalent series of contingent pre-emptive rights that offsets the dilution.

Corp. v. Governor of Maryland held that the law is consistent with the Commerce Clause, even on the assumption that it injures consumers and investors alike. A state with the power to forbid mergers has the power to defer them for three years. Investors can turn to firms incorporated in states committed to the dominance of market forces, or they can turn on legislators who enact unwise laws. The Constitution has room for many economic policies. "[A] law can be both economic folly and constitutional." *CTS*, 481 U.S. at 96-97 (Scalia, J., concurring). Wisconsin's law may well be folly; we are confident that it is constitutional.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

88-C-1296 (JPS)

AMANDA ACQUISITION CORPORATION,
Plaintiff,

—vs.—

UNIVERSAL FOODS CORPORATION, ALAN R. ANDERSON, MICHAEL E. BATTEN, DR. OLAN D. FORKER, DR. CAROL I. WASLIEN GHAZAII, LEON T. KENDALL, PAUL L. KOHNSTAMM, CHARLES S. MCNEER, ORVILLE R. MERTZ, JOHN L. MURRAY, DR. BERNARD S. SCHWEIGERT, GUY A. OSBORN, GERARD E. VENEMAN, and DARRELL E. WILDE,
Defendants,

—and—

UNIVERSAL FOODS CORPORATION,
Counterclaim Plaintiff,

—vs.—

AMANDA ACQUISITION CORPORATION,
Counterclaim Defendant,

—and—

HIGH VOLTAGE ENGINEERING CORPORATION, HYDE PARK PARTNERS, L.P., HYDE PARK HOLDINGS, INC., LAURENCE S. LEVY, CLIFFORD PRESS, OXBRIDGE CAPITAL CORPORATION, BERISFORD CAPITAL CORPORATION, and S. & W. BERISFORD PLC,
Additional Counterclaim Defendants.

APPEARANCES:

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High Voltage Engineering Corporation
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DECISION AND ORDER

This matter is before the court on four separate motions each of which seeks preliminary injunctive relief. These motions, three of which were filed by the plaintiff and one of which was filed by the defendants, include

1. plaintiff's motion to enjoin operation of the defendants' shareholders rights plan (the poison pill);

2. plaintiff's motion for injunctive relief declaring Wisconsin's Business Combination Act, Wis. Stat. § 180.726, unconstitutional;

3. plaintiff's motion for injunctive relief regarding defendants' alleged Federal securities laws claims; and

4. defendant/counterclaim plaintiff's motion to enjoin plaintiff's tender offer on account of alleged violations of Federal securities laws as well as alleged violations of the margin rules promulgated by the Federal Reserve Board.

Following expedited discovery and briefing the issues, a two-day evidentiary hearing was held in conjunction with these motions on February 2 and 3 of this year.

At the outset I wish to commend the parties and their counsel for the thoroughness in their presentations to the court, considering the severe time constraints under which voluminous documents were reviewed, witnesses deposed, and legal authorities presented in support of their respective positions.[1] Following a review of the parties' submissions, I am now ready to render my decision on each of the four motions.

Plaintiff's claims arise under the United States Constitution and §§ 14(d), 14(e) and 28 of the Exchange Act, (the Exchange Act) 15 U.S.C. §§ 78n(e) and 78bb, and the rules and regulations promulgated thereunder. Defendant's counterclaims arise under §§ 7, 14(d), 14(e), 27 and 28 of the Exchange Act, 15 U.S.C. §§ 78(g), 78n(d), 78n(e), 78aa and 78bb, and the rules and regulations promulgated thereunder. Jurisdiction is con-

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1 One measure of the intensity with which the parties have pursued this litigation may be found in the sheer volume of materials presented to the court for consideration. These materials include the following:

(1) 27 affidavits or declarations totaling hundreds of pages in all;

(2) 23 transcripts of depositions totaling more than 3,400 pages;

(3) 522 exhibits, in all totaling many thousands of pages;

(4) the transcript of the evidentiary hearing which lasted more than 18 hours over two days and produced a transcript of 829 pages; and finally,

(5) more than a dozen briefs and letter memoranda in all totaling 614 pages.

ferred on this court under § 27 of the Exchange Act, 15 U.S.C. § 78aa and 28 U.S.C. §§ 1331 and 1337, and the doctrine of pendent jurisdiction.

I. FACTS

The parties have agreed to a limited number of facts in this case. The remainder of the facts are derived from the testimony at the hearing, the exhibits, affidavits, and deposition transcripts which have been filed with the court.

A. The Parties

Plaintiff Amanda Acquisition Corporation (Amanda) is a Delaware corporation with its principal executive offices in Burlington, Massachusetts. It was formed on November 23, 1988 for the purpose of acquiring defendant Universal Foods Corporation (Universal, Universal Foods, or the Company) and is not engaged in any other business. Amanda is a wholly owned subsidiary of counterclaim defendant High Voltage Engineering Corporation (HVE), a Massachusetts corporation with its principal executive offices also located in Burlington, Massachusetts. HVE was purchased in a hostile tender offer in early 1988 by counterclaim defendant Hyde Park Partners, L.P. (Hyde Park).

Hyde Park is a Delaware limited partnership, 50 percent of which is owned by defendant Hyde Park Holdings, Inc. (Holdings), a New York corporation, and affiliates controlled by defendants Laurence S. Levy and Clifford Press. The remaining 50 percent interest is owned by additional counterclaim defendant Oxbridge Capital Corporation (Oxbridge), a Delaware corporation and a wholly owned subsidiary of another additional counterclaim defendant, Berisford Capital Corporation (Berisford Capital), a New York corporation which is itself an indirect wholly owned subsidiary of additional counterclaim

defendant S. & W. Berisford PLC (Berisford PLC), an English public limited company.[2]

Holdings is controlled by Messrs. Levy and Press and is the sole general partner of Hyde Park. The business address of Levy and Press is New York, New York. Levy is chairman of the board and secretary of Amanda. He is also chairman of the board and vice president of HVE, and chairman of the board, secretary and treasurer of Holdings. Press serves as president, treasurer and a director of Amanda. He is also deputy chairman of the board and vice president of HVE and president and a director of Holdings.

Defendant and counterclaim plaintiff Universal Foods is a Wisconsin corporation with its principal executive offices located in Milwaukee, Wisconsin. Universal is a diversified manufacturer and marketer of food ingredients and certain consumer food items. Products manufactured by Universal include cheese, yeast, frozen food, dehydrated products, and flavoring and coloring ingredients. Universal Foods' common stock is registered pursuant to § 12 of the Exchange Act, 15 U.S.C. § 781, and is listed and traded on the New York Stock Exchange and the Pacific Stock Exchange. The market price for Universal's common stock, adjusted for stock splits, was $9.67 per share on September 30, 1984, and rose to $24.00 per share by September 30, 1988.

Defendant Guy A. Osborn became chief executive officer of Universal Foods on October 1, 1988 and has served as president since 1984 and as a director of the company since 1983. Defendant John L. Murray is chairman of the board of Universal Foods and was, until October 1, 1988, chief executive officer of the company. Defendant Darrell E. Wilde is a senior vice president and a director of Universal Foods.

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2 S. & W. Berisford PLC has recently changed its name to Berisford International PLC. Unless noted otherwise, the term Berisford will collectively refer to Oxbridge, Berisford Capital and Berisford PLC. The interests of these three companies and their relationship to this offer are substantially similar and have been represented throughout the proceedings by their own counsel. When necessary to refer to all counterclaim defendants collectively, I will use the term Acquisition Group.

The remaining defendants, Alan R. Anderson, Michael E. Batten, Dr. Olan D. Forker, Dr. Carol I. Waslien Ghazaii, Leon T. Kendall, Paul L. Kohnstamm, Charles S. McNeer, Dr. Bernard S. Schweigert and Gerard E. Veneman are all directors of Universal Foods. Defendant Orville R. Mertz was a director of Universal until he retired on January 26, 1989, after reaching a mandatory retirement age.

Each of the individual defendants, other than Osborn, Murray and Wilde, are nonmanagement and independent directors of Universal. Each is also a business or professional person with either experience in general business matters or special expertise in the particular areas in which Universal transacts business. For instance, Veneman is the retired president of Nekoosa Papers, Inc. Kendall is chairman of the board of the Mortgage Guarantee Insurance Company. McNeer is chairman of the board and chief executive officer of Wisconsin Energy Corporation. Anderson is chairman of the board and chief executive officer of P.A. Bergner and Company. Batten is president and chief executive officer of Twin Disc, Inc. Dr. Forker is a professor in the department of agricultural economics at Cornell University. Dr. Waslien Ghazaii is a professor and program director for the nutrition and food service program at the City University of New York, Hunter College. Kohnstamm is president of General Color Company. Mertz is chairman of Mertz, Inhorn and Associates. Dr. Schweigert is chairman of the department of food science and technology in the college of agriculture and environmental sciences at the University of California, Davis.

B. The Tender Offer

On December 1, 1988 Amanda announced a tender offer to acquire all shares and rights of Universal Foods at a price of $30.50 per share in cash. This offer was communicated to Universal management by way of a phone call from Mr. Press to Mr. Osborn at approximately 3:12 P.M. CST on December 1, 1988. The letter from Press to Universal's management announcing the offer was hand delivered to Osborn about 4:00 P.M. Between these two occurrences this action was filed, at

approximately 3:45 P.M. Amanda officially commenced its offer with the filing of its schedule 14D-1 with the Securities and Exchange Commission (SEC) on December 2, 1988.

Amanda's offer was conditioned upon the following:

(a) Seventy five percent of the outstanding shares being tendered by the shareholders;

(b) A final judgment finding the Wisconsin Business Combination Act to be either unconstitutional or inapplicable to the offer;

(c) Redemption of the shareholders rights plan (Rights Plan or Poison Pill);

(d) A declaration of ineffectiveness against Amanda of Article 10 of Universal's restated Articles of Incorporation, the "put" provision;[3] and

(e) Amanda being able to obtain sufficient financing to enable it to purchase all outstanding shares and pay all related fees and expenses.

For purposes of the pending motions only the first three conditions are relevant.

On December 8, 1988 the Universal board of directors voted to recommend that its shareholders reject the offer at the $30.50 price. On December 15, 1988 Amanda announced that it was increasing its offer to $35.00 per share. After a meeting on December 20, 1988 the Universal board voted to recommend that its shareholders reject this revised offer. Amanda had filed its first motion for a preliminary injunction (regarding the statute) on December 14, 1988. A status conference was held with the parties on December 19, 1988, at which the hearing dates of February 2-3, 1989 were established. Shortly thereafter, it was reported in the national press that Amanda was not

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3 This "put" provision is triggered by a tender offer in which a buyer becomes the owner of more than 50 percent of Universal's common stock or the holder of more than 50 percent of the common stock initiates a tender offer which results in a higher level of ownership. In either event the remaining holders of Universal stock are entitled to "put" their shares to the company at the highest price determined under a number of alternate formulas set forth in the articles.

strenuously pursuing its offer until resolution of the issues before the court. At the time of the February hearing, approximately 17 percent of the outstanding shares of the Universal stock had been tendered or "put into the box" as a result of Amanda's offer. This number includes approximately 3.6 percent of Universal Foods' common stock presently owned by Amanda or its affiliates. As of February 17, 1989, as reported in the New York Times, Amanda and HVE had announced that approximately 27 percent of the shares of Universal have been tendered. Additional facts, as they relate to and have an impact on resolution of the individual motions, shall be stated below.

II. LEGAL STANDARDS

It must be remembered that each of the motions before the court is a motion for preliminary injunction. When seeking a preliminary injunction, the movant bears the burden of establishing the five requirements necessary for the issuance of the injunction:

> (1) That it has no adequate remedy at law;
>
> (2) that it will suffer irreparable harm if the preliminary injunction is not issued;
>
> (3) that the irreparable harm it will suffer if the preliminary injunction is not granted outweighs the irreparable harm the defendant will suffer if the injunction is granted;
>
> (4) that it has a reasonable likelihood of prevailing on the merits; and
>
> (5) that the injunction will not harm the public interest.

Curtis v. Thompson, 840 F.2d 1291, 1296 (7th Cir. 1988); *Baja Contractors, Inc. v. City of Chicago*, 830 F.2d 667, 675 (7th Cir. 1987), *cert. denied* 108 S. Ct. 1301 (1988), *citing Manbourne, Inc. v. Conrad*, 796 F.2d 884, 887 (7th Cir. 1986). There is persuasive authority that the movant's demonstration of irreparable injury implies that the remedies at law are inadequate. *See Fleet Wholesale Supply Co., Inc. v. Remington Arms Co., Inc.*, 846 F.2d 1095 (7th Cir. 1988).

There can be little question that if either of Amanda's two principal motions relating to the Wisconsin statute and shareholders rights plan were denied, it would suffer irreparable injury. Failure on either of those two motions may well preclude a successful hostile takeover by Amanda since the hurdles posed by the Wisconsin Business Combination Act (the Act, or Wisconsin act) and the shareholders rights plan may well prove insurmountable. However, it is my conclusion that granting the injunction on either of those issues would be equally harmful to Universal. If Amanda succeeds on those issues Universal's defensive measures become nonexistent. If the takeover offer is allowed to proceed on present terms and is successful, it is impossible for Universal to turn the clock back because the company will be sold. Under these circumstances, the balance of the injuries to the respective parties is approximately equal. *See*, e.g., *Dynamics Corp. of America v. C.T.S. Corp.*, 794 F.2d 250, 252 (7th Cir. 1986), *reversed on other grounds*, *C.T.S. Corp. v. Dynamics Corp. of America*, 481 U.S. ____, 107 S. Ct. 1637 (1987). In deciding these two motions, I find that the determining factor in granting or denying the injunction turns on the likelihood of plaintiff's ultimate success on the merits.

As concerns the other two motions, plaintiff's motion regarding the Williams Act violations and defendants' motion regarding Williams Act and margin rules violations, as will be seen below, the balance of harms to the respective parties is not as equal and will play a more determining role in resolution of those two motions.

III. UNIVERSAL'S MOTION

In its two-part motion, Universal seeks to enjoin the tender offer pending complete compliance with both the margin rules and the Williams Act disclosure requirements. Plaintiff and counterclaim defendants oppose the motion, arguing

(1) that Universal has no standing to litigate margin rule violations;

(2) that Universal's Williams Act claims are without merit; and

(3) in any event, any margin rule or Williams Act violations have been mooted by the January 30, 1989 filing of amendment 13 to Amanda's schedule 14d-1.

Plaintiff and counterclaim defendants contend that this latest amendment does everything which the law requires of them, even if Universal's claims had merit. I will address this motion first because if this motion is successful, the need to resolve the other motions may be moot. However, my review of the materials and legal authorities brought to the court's attention convince me that Universal's motion should be denied.

Defendants' motion raises questions about the financing and control structure of the Amanda offer. Through discovery in this case, it has been determined that the relationships among the Acquisition Group parties are extremely complex. The corporate structure as presented by Universal at the hearing and modified in the testimony of Mr. Press is attached as Appendix B.

The financing is almost as complex. Amanda is contributing $10 million in equity to the total cost of the offer. Press's testimony established that this $10 million contribution could realistically be traced back to Berisford. Berisford Capital is purchasing $110 million in preferred stock in Amanda. The preferred stock has no right of redemption and at present has no stated dividend rate. Amendment 13 to Amanda's Schedule 14D-1 states that the stock will pay such dividends as are declared from time to time by the board of the purchaser (*i.e.* Amanda). The parties anticipate that following the offer, the board of the purchaser will determine a fair and appropriate dividend rate in light of the circumstances of the time.

Additional funds will be provided by Chase Manhattan Bank. Chase will provide up to 50% of the purchase price, which is to be secured by the stock of Universal. All parties agree that this is a margin loan. (The offer does have an alternative financing structure in the event of a friendly merger. I do not find this relevant, notwithstanding Amanda's experts' contentions to the contrary, because at this juncture this is a hostile

takeover and there seems to be little chance of it converting to a friendly merger.) In addition to the Chase loan, Kidder Peabody & Co. will supply financing in the amount of $159 million, which will be senior subordinated debt. Kidder will raise the money by issuing high yield bonds, or "junk bonds." The final amount of money will be provided by Berisford Capital which will supply $75 million in junior subordinated debt. Both the Kidder and Berisford Capital investments are subordinate to the Chase loan.

HVE has guaranteed the loans to both Kidder and Berisford Capital. This, Amanda argues, brings them within one of the safe harbors of the Federal Reserve's margin rules to escape the presumption that these type of loans would be indirectly secured by the stock of the target and so also be a margin loan. In turn, HVE's guarantees are backed by Berisford PLC.

Universal also raises the issue of who is really controlling this offer. Universal contends that Berisford PLC is controlling this offer and Messrs. Levy and Press are just agents or fronts for Berisford PLC. Universal asks that the court enjoin the tender offer and force the Acquisition Group to sit down and prepare a concise, clear and complete tender offer which reflects the relationship of the parties and complies in full with the margin rules, and communicate such offer to the shareholders.

A. Margin Rules

Both parties rely on *Bassler v. Central National Bank in Chicago*, 715 F.2d 308 (7th Cir. 1983), in disputing whether Universal has a right to assert Amanda's violation of the margin requirements as set forth in § 7(d) of the Exchange Act, 15 U.S.C. § 78g(d) and the regulations promulgated thereunder. Amanda finds support for the simple proposition that there is no right of action under the margin rules. Universal claims the holding in *Bassler* is limited to its own facts, and that the court did not consider the possibility of a right of action existing in a target corporation. The discussion in *Bassler* does support Universal's position, as the court only clearly considered application of the rules to individual investors and stated its conclusion in narrow terms: "[T]here is no indication of legislative intent,

explicit or implicit, to create a private right of action in individuals in Bassler's position as against lenders in Central's position." *Id.* at 313. Similarly, while other circuits probing the question have denied a private right of action, often in broad terms, they do not appear to have considered the issue of standing vis-a-vis the target corporation. *Bassler*, 715 F.2d at 312 (and sources cited therein).

The guidelines set out in *Cort v. Ash*, 422 U.S. 66 (1975), *rev'g* 496 F.2d 416 (3d Cir. 1974) for determining the existence of a private right of action govern this case. *Cort* outlined four requirements for an implied right of action:

> (1) Whether plaintiff belongs to the class for whose "especial benefit" the statute was enacted;
>
> (2) whether there is any indication of legislative intent, explicit or implict, either to create such a remedy or to deny one;
>
> (3) whether implying such a remedy is consistent with the underlying purpose of the legislative scheme; and
>
> (4) whether the cause of action is "traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." *Id.* at 78.

In *Bassler*, the seventh circuit explicitly recognized that the second of the above four factors—legislative intent— is the key and that the *Cort* mode is but one of several permissible approaches to ascertainment of that intent. *Bassler*, 715 F.2d at 310. Despite the narrow wording of the *Bassler* court's conclusion, its analysis has broader implications, indicating that no congressional intent to create a private right of action exists in pertinent legislative history. *Id.* at 311-13. In fact, "[t]he main purpose [of the 1934 act was] to give a Government credit agency an effective method of reducing the aggregate amount of the nation's credit resources which can be directed by speculation into the stock market and out of other more desirable uses of commerce and industry . . . ." House Comm. on Interstate and Foreign Commerce, Report on H.R. 9323, H.R.

Rep. No. 1383, 73d Cong., 2d Sess. 8 (1934) (quoted in *Bassler*, 715 F.2d 308 (1983)).

The margin regulations provide the government with tools for use in credit regulation. That a target company might incidentally benefit from these regulations does not necessarily create a right in favor of such companies. *Cf. Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 478 (1976) ("As in *Cort v. Ash*, 422 U.S. 66, 80 (1975), we are reluctant to recognize a cause of action here to serve what is 'at best a subsidiary purpose' of the federal legislation."); *Bassler*, 715 F.2d at 313.

A few courts have found that target companies had a private right of action under § 7. Perhaps the best reasoning toward this end is found in *Pabst Brewing Co. v. Jacobs*, [1982-83 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,042 (D.Minn. March 8, 1982). Noting the Exchange Commission's concern for instability in the prices of individual securities, the *Pabst* court reasoned:

> The issuer is clearly a member of the class whom Congress intended to benefit by enactment of the statute. *Cort*, 422 U.S. at 78.
>
> The language of § 7, itself, suggests the availability of a private cause of action. In *Touche Ross*, 442 U.S. at 569, the Supreme Court refused to find a private right of action because the language of the statute at issue 'neither confers rights on private parties nor proscribes any conduct as unlawful.' In contrast, § 7 expressly proscribes as unlawful the extension or receipt of credit in contravention of the margin rules. . . . .
>
> Congressional intent to create a private right of action can also be inferred from the "contemporary legal context" in which amendments to the statute were enacted. *Cannon*, 441 U.S. at 698-99. At the time Congress enacted the 1968 and 1970 amendments to § 7, a number of courts had held that there was an implied right of action under § 7. *See, e.g., Livingston v. Weis, Voisin, Cannon, Inc.* 294 F. Supp. 676, 681 (D. N.J. 1968); *Sezysko v. Chase Manhattan Bank*, 290 F. Supp. 74 (S.D.N.Y. 1958), *aff'd per curiam on opinion below*, 409 F.2d 1360 (2d Cir.),

cert. denied, 396 U.S. 904 (1969); *Remar v. Clayton Securities*, 81 F. Supp. 1014 (D. Mass. 1949).

The third *Cort* factor also supports implication of a private right under Section 7. The SEC and the Federal Reserve Board have both encouraged courts to imply such a private action as a necessary supplement to the SEC's enforcement efforts. *See, e.g., Palmer v. Thomson & McKinnon, Auchincloss, Inc.*, 427 F. Supp. 915, 917 n.1 (D. Conn. 1977); *Pargas, Inc. v. Empire Gas Corp.*, 423 F. Supp. at 251-256 (D. Md. 1976).

Id. at 94,953.

The *Pabst* court's reasoning is persuasive in several respects. I realize that allowing a target company a private right of action under § 7 may well serve as a useful supplement to government enforcement efforts. And Congress, in enacting the statute, undoubtedly had some concern for the instability of individual securities issues. But the statute and regulations are distinctly regulatory, proscribing certain conduct without suggesting a corresponding extension of rights. Of course, the central issue is specific congressional intent. While *Pabst* correctly cites cases for the proposition that an implied right of action existed prior to the 1968 and 1970 amendments, none of these cases consider, or offer an analogue to, target company or issuer standing. The *Pabst* court implicitly relied on the fact that the 1970 amendments specifically eliminated investor standing, *see Stern v. Merrill Lynch, Pierce, Fenner & Smith*, 603 F.2d 1073 (4th Cir. 1979) (citing cases), without eliminating issuer standing. But I find no authority suggesting that any court ever considered that issuer standing might even be possible under the statute prior to the amendments. Rather, it appears that issuers' rights are simply not within the contemplation of the statute.

Given the "strict approach" to implying private rights of action required by *Cort*, and the seventh circuit's impliedly "uninhibited" but vain search for intent in *Bassler*, I must conclude there is no private right of action under § 7. *Cf. Pargas, Inc. v. Empire Gas. Corp.*, 423 F. Supp. 199 (1976) (finding standing because issuer has personal stake, is subject to injury from violation, and is arguably within the statute's regulatory

zone of interests, or because protection of such parties is supplemental aim of regulations, rather than applying *Cort* standards), *aff'd mem.*, 546 F.2d 25 (4th Cir.). This absence of intent is affirmed by the clear indication that the margin regulations were not created for the "especial benefit" of target companies.

Notwithstanding the unavailability of a private right of action under § 7 of the Exchange Act or the regulations promulgated thereunder, a number of courts have found that a target company does have standing to allege failure to disclose margin violations. *See, e.g., Koppers Co., Inc. v. American Express Co.*, 689 F. Supp. 1371, 1397 (W.D. Pa. 1988); *Revlon, Inc. v. Pantry Pride, Inc.*, 621 F. Supp. 804, 814 (D.Del. 1985) (and sources cited therein). Each of these courts considered the allegations of margin violations as a violation of Williams Act disclosure requirements. The Acquisition Group contends that amendment 13 to Amanda's 14D-1, filed January 30, 1989, discloses the allegations which Universal raises and this is sufficient to meet its legal obligations. *Avnet, Inc. v. Scope Industries*, 499 F. Supp. 1121, 1125 (S.D.N.Y. 1980). *See also USG Corp. v. Wagner & Brown*, 689 F. Supp. 1483, 1492-93 (N.D. Ill. 1988) (disclosure of a dispute regarding alleged Hart-Scott-Rodino violations, as opposed to violations themselves, sufficient to defeat a motion for a preliminary injunction). I believe that, because I do not reach the issue of whether the margin rules were actually violated, a disclosure of alleged violations, without actually admitting that violations exist, does satisfy Amanda's and the Acquisition Group's legal obligations. However, while the alleged violations will not support enjoining the tender offer (because without standing or a right to challenge the margin financing Universal has no chance of success on the merits), they will play a role in the outcome of this suit.

B. Williams Act

Universal has also raised what has been termed by the counterclaim defendants as the "bidder" issue. Universal contends that Berisford PLC is the real party controlling this tender offer

and that the Acquisition Group has failed to disclose this material information to the company and the shareholders. Again, the counterclaim defendants contend that amendment 13 moots any of Universal's claims because Berisford has done everything which would be required of a bidder. Universal responded, at the hearing, that court acceptance of the Acquisition Group's argument will foster unlawful activity. Universal contends that merely requiring disclosure, without additional sanctions, will lead others to violate the law. The argument continues that parties will violate because at worst all that they will face is the prospect of having to file amendments. Therefore, if they get away with it, well and good; if not, simply correct the matter later.

It is settled that the appropriate remedy for a violation of the Williams Act disclosure requirements is disclosure. *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975). Universal asks this court to impose an obligation on the parties to turn back the clock, write a new offer to purchase, and communicate that to the shareholders. (Amendment 13 was filed with the SEC but not mailed to the shareholders.) Amanda's counsel stated to the court that it would communicate whatever information to the shareholders the court required, but requiring a new offer to purchase was not warranted. Berisford counsel argue that all material information has been disclosed and that information which is not disclosed is immaterial.

The issue of whether Berisford is really the party on behalf of whom the offer is made is a fact specific question. Messrs. Levy and Press testified that they were the persons actually controlling this offer and the Berisford parties were only kept informed of their decisions. Numerous documents have been brought to the court's attention which imply that Berisford has the right to control the terms and conditions (including price) of the offer and would control Universal after the acquisition. Levy and Press both testified that those documents did not control the present offer, but admitted that the documents were used in planning the offer. The documents included such control for Berisford as approving the timing and amount of the offer, appointing a majority of the Universal board, providing management expertise in running Universal (Berisford is in the food

industry), and providing the majority of the equity for the investment. Berisford officers have testified that they are involved in this offer solely for investment purposes. All Acquisition Group parties have stated they have a good working relationship and as a matter of courtesy inform the others of what events occur and what future steps are planned, which explains the trip to London by Levy and Press to meet with Berisford people prior to increasing the amount of the offer.

At present, no complete written agreement between Amanda and Berisford exists with respect to the tender offer for Universal. Certain matters are defined. These include Berisford's obligation to indemnify the parties for costs incurred through the back end merger, to pay Levy and Press a specified fee for their services both through the merger and (as a management fee) after the merger, and agreed to guarantee the financing guarantees made by HVE to Kidder, Chase, and Berisford Capital. The lack of a written agreement contrasts sharply with the HVE takeover by Hyde Park in early 1988. Levy, Press and Berisford were also involved in that transaction. In that, the parties operated under a comprehensive document which was termed the Hyde Park I Partnership Agreement. The agreement defined the parties respective roles during the acquisition and after the takeover.

Universal's contentions regarding the alleged violations on this issue relate to the failure on the part of the Acquisition Group to completely reveal the relationship and agreements between the parties making the offer, the failure of Berisford to admit it is the party for whom the offer is made, the failure of the Acquisition Group to reveal the margin rule violations, the failure to reveal that Berisford will have to consolidate the debt from this deal on its own balance sheet, and the failure to reveal that Berisford will have to get shareholder approval for its participation in this offer. All of these contentions have been disclosed by the Acquisition Group in its amendments which have

been filed with the SEC. Universal, as noted, wants more disclosure.[4]

Based on the present record, it is not possible to conclusively state that Berisford is a bidder and controlling this offer. Certainly in the broad sense the tender offer for Universal makes more economic and practical sense if Berisford is viewed as the real party in interest. Berisford is a British food company with growth aspirations in the American market. Berisford is allegedly providing massive sums of capital for this investment, with a relatively small return. And Philip Aaronberg, a director of Berisford PLC, stated that at some point in the next few years they may look to Universal with their "own covetous eyes." (After reviewing the transcript, it is difficult to ascertain whether the "they" meant Berisford PLC or Hyde Park, of which Berisford indirectly owns 50%.) Levy and Press are young men with no experience in the industries in which Universal operates. HVE has no product lines in common with those of Universal. HVE is also a small company which just recently was purchased by Hyde Park and has little extra cash flow to invest in an offer of this size.

However, the only factual testimony presented demonstrates that Levy and Press are the controlling parties to this transaction and Berisford PLC and its subsidiaries are participants for investment purposes. The matters raised by Universal are based on its own inferences and conclusions gleaned from documents which involved the prior discussions between Hyde Park, Berisford and Resource Planning, Inc., a nonparty in this suit. No testimony was presented to rebut that of the Acquisition Group

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4 The issue of whether Berisford needs shareholder approval has been recently resolved by the London Stock Exchange. On March 7, 1989 the exchange determined that based on Berisford's contribution of $195 million, which represents 24% of Berisford's assets, no shareholder vote is needed. If the contribution increases to more than 25% of Berisford's assets, a vote by Berisford's shareholders will be required. This information has been included in amended filings with the SEC. The parties have made much of this issue in recent submissions to the court, each side drawing its own inferences. While I find this information interesting, particularly the fact that Berisford may be required to secure shareholder approval under certain conditions, that fact is of no significance in reaching my decision today.

witnesses. For the purpose of this motion, I find that Universal has not met its burden of demonstrating a reasonable likelihood of success on the merits to diminish the need to weigh the respective harms to the parties.

If the motion is denied, Amanda's offer remains on the table, and Universal is forced to use other means which are in the best interests of the shareholders and the corporation to deal with the offer. If the motion is granted, Amanda must in essence start from scratch and may miss a unique business opportunity, namely the acquisition of Universal. Clearly, the harms weigh in favor of Amanda. In addition, the public could be harmed by granting the injunction. If the offer is enjoined pending a full trial on the merits, the shareholders may face the prospect of Amanda withdrawing the offer without a substantial likelihood that Universal will succeed in challenging Berisford's role. Therefore, Universal's motion to enjoin the offer pending trial or the Acquisition Group creating a new offer will be denied. As with the alleged margin violations, however, the ambiguities raised by the lack of an agreement, and the prior agreements which the Acquisition Group contends are no longer operable, are relevant to other issues raised by this suit.

IV. WILLIAMS ACT MOTION

Amanda contends that Universal has violated both sections 14(d) and 14(e) of the Exchange Act, 15 U.S.C. §§ 78n(d)(4) and 78n(e), by making recommendations without complying with the rules and by making untrue statements of material fact. The statutes state in relevant part:

> (d)(4) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
>
> (e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements

made, in light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent such acts and practices as are fraudulent, deceptive, or manipulative.

The first allegations concern rules 14e-2(a) and 14d-9(a) promulgated by the SEC pursuant to § 14(d), 17 C.F.R. §§ 240.14e-2(a) and 240.14d-9(a). Rule 14e-2(a) provides that the target company shall provide within ten days of the tender offer a statement to shareholders which either (a) recommends acceptance or rejection of the tender offer, or (b) expresses no opinion and is remaining neutral to the offer, or (c) is unable to take a position with respect to the offer and the reasons why the target management cannot take a position. Rule 14d-9(a) provides that any recommendation must include information and the reasons for the recommendation.

The statements which Amanda claims are in violation of the rules include

- John Murray's statement on December 1, 1988 in which he told the press that a meeting of the board would be held in due course and he would recommend the board reaffirm its "not for sale" position. (A schedule 14D-9 was filed by Universal with regard to this statement on December 2, 1988.)
- Guy Osborn's statement in the December 2 14D-9 which said that the statement of Murray was not a recommendation of the board. (The SEC sent a letter to Universal which said the press release violated the rules and to file the proper forms. Universal's response to the SEC explaining its position on the matter was not answered.)
- Lack of reasons for the recommendation in the 14D-9 of December 2.

- Statement of Ken Manning, Universal vice president, to the Milwaukee Business Journal for the week of December 5 that Murray planned to recommend rejection of the offer. Amanda claims no 14D-9 was ever filed.
- December 7, 1988 filing of a petition by Universal with the Wisc. Comm. Sec. under Wis. Stat. § 552.05(4) which Amanda contends is another recommendation for which no 14D-9 was filed.

At the hearing, Amanda withdrew all the issues from consideration except the alleged disclosure violation relating to the December 1, 1988 press release. Amanda contends that when Murray recommended rejection of the offer, he was required to provide reasons for that recommendation. Amanda feels it is important that this failure be disclosed to the shareholders because they have a right to know that Murray had, in its opinion, no reason for his opposition to the offer. The other issues were withdrawn due to the complexity of the record before the court.

First of all, it is debatable whether the press release was a recommendation or a "stop, look and listen" communication to the shareholders. The latter is perfectly within a target's prerogatives without filing a 14D-9. 17 C.F.R. § 240.14d-9(e); *Anaconda Co. v. Crane*, 411 F. Supp. 1210, 1215 (S.D.N.Y. 1975). If it was a "stop, look and listen" communication, no reasons need be given. Secondly, I find that if it was a recommendation, it came from management, not the board of directors. Perhaps more importantly, even if it was a recommendation which did not contain reasons, the issue is moot because of the increased offer. Thus, there is no irreparable injury justifying injunctive relief. *See Gulf Corp. v. Mesa Petroleum Co.*, 582 F. Supp. 1110 (D.Del. 1984).

Amanda's other allegations concern violations of § 14(e) which involve the matters of misrepresentations. I construe counsel's comments as withdrawing these from the court's consideration as well. Therefore, I need not reach the issue of whether any material misrepresentations were made and whether they would support injunctive relief.

V. THE WISCONSIN BUSINESS COMBINATION ACT

Amanda's tender offer is conditioned on, among other things, invalidation of Wisconsin's Business Combination Act, Wis. Stat. § 180.726, or Amanda's otherwise being satisfied that the Act is inapplicable to the offer.

Amanda contends that the Act is preempted by the Williams Act, 15 U.S.C. §§ 78m(d) and 78n(d)-(e), and therefore violative of the supremacy clause, art. VI, cl. 2 of the United States Constitution. In addition, Amanda contends the Act violates the commerce clause, art. I, § 8, cl. 3 of the United States Constitution because it places an excessive burden on interstate commerce. In taking up the question of whether the Act is violative of the Constitution, I note the well-established principle that every duly enacted state law is entitled to the presumption of constitutionality. *See, e.g., Lockport v. Citizens for Community Action*, 430 U.S. 259, 272 (1977), *motion denied*, 431 U.S. 902.

Because a second-step merger is the purpose of the offer, defendants' reply memorandum at 32, the chief provision in dispute is Wis. Stat. § 180.726(2), which provides:

> Except as provided in sub. (5), a resident domestic corporation may not engage in a business combination with an interested stockholder of the resident domestic corporation for 3 years after the interested stockholder's stock acquisition date unless the board of directors of the resident domestic corporation has approved, before the interested stockholder's stock acquisition date, that business combination or the purchase of stock made by the interested stockholder on that stock acquisition date.

"Business Combination" is defined in § 180.726(1)(e) and includes various forms of self-dealing between an interested stockholder and the corporation. An "interested stockholder" of a resident domestic corporation is a person other than the resident domestic corporation or a subsidiary of the resident domestic corporation who is a) "the beneficial owner of at least 10% of the voting power of the outstanding voting stock of the

resident domestic corporation," or b) "an affiliate or associate of that resident domestic corporation and at any time within 3 years immediately before the date in question was the beneficial owner of at least 10% of the then outstanding voting stock of that resident domestic corporation." Wis. Stat. § 180.726(j)1. " 'Stock acquisition date', with respect to any person, means the date that that person first becomes an interested stockholder of that resident domestic corporation." Wis. Stat. § 180.726(n). The Act is set forth, in full, in Appendix A to this opinion. Particular provisions will be referenced where helpful.

A. The Williams Act Challenge

Amanda contends that the Williams Act preempts the Wisconsin act, making the latter violate the supremacy clause. The Supreme Court's decisions on preemption leave no doubt that "absent an explicit indication by Congress of an intent to preempt state law, a state statute is preempted only" where complying with both federal and state regulations is physically impossible, or where the state law is an obstacle to accomplishing and executing Congress' full purposes and objectives. *C.T.S. Corp. v. Dynamics Corp. of America*, 481 U.S. ____, 107 S. Ct. 1637, 1644 (1987) (citations omitted) *rev'g Dynamics Corp. of America v. C.T.S. Corp.*, 637 F. Supp. 389 (N.D. Ill. 1986), *aff'd*, 794 F.2d 250 (7th Cir.). Entities can comply with both the Williams Act and the Wisconsin act. Therefore, the Wisconsin act can be preempted only if it frustrates the Williams Act's purposes.

In making both their Williams Act and commerce clause arguments, the parties in this case chiefly rely on *CTS*, 107 S. Ct. 1637 (1987), and *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), *aff'g MITE Corp v. Dixon*, 633 F.2d 486 (7th Cir. 1980). In *MITE*, a divided Court struck down on commerce clause grounds an Illinois statute that provided for a twenty-day precommencement period, during which time management could disseminate its views on an upcoming tender offer but offerors could not publish their offer. The statute also provided that the fairness of tender offers would be reviewed by the Illinois secretary of state. A three member plurality found the stat-

ute preempted by the Williams Act. In *CTS*, the Court upheld an Indiana statute requiring a majority vote of disinterested shareholders before an entity acquiring controlling shares is entitled to voting rights. The acquiror can require management to hold a shareholder vote within fifty days if the acquiror files the appropriate statement, requests a special meeting and agrees to pay the expenses of the meeting. The Seventh Circuit Court of Appeals found the statute preempted under the Williams Act based on the view that the law's practical effect was to delay consummation of tender offers until fifty days after their commencement. *CTS*, 107 S. Ct. at 1647. Though both the Illinois and the Indiana statute are distinct from Wisconsin's act, the Court's reasoning is instructional to the present case.

The Williams Act governs disclosure and procedure with respect to tender offers. *See generally CTS*, 107 S. Ct. at 1644 (summarizing structure and purposes of Williams Act). In *MITE*, 457 U.S. 624 (1982), as interpreted by the *CTS* Court, the three-member plurality "concluded that the Williams Act struck a careful balance between the interests of offerors and target companies, and that any state statute that 'upset' this balance was preempted." *CTS*, 107 S. Ct. at 1645 (citing *Edgar v. MITE Corp.*, 457 U.S. at 632-634). The *CTS* Court found its holding to fall within the scope of the *MITE* plurality's analysis, but effectively cast doubt on that analysis in not expressly adopting the plurality's reasoning:

> As the plurality opinion in *MITE* did not represent the views of a majority of the Court, we are not bound by its reasoning. We need not question that reasoning, however, because we believe the Indiana act passes muster even under the broad interpretation of the Williams Act articulated by Justice WHITE in *MITE*.

CTS, 107 S. Ct. at 1645. This court need not question the correctness of Justice White in *MITE*, if the present case is governed by the reasoning applied in *CTS*. But a discussion of the Williams Act's purposes is illuminating, particularly given the limited precedential value of the *MITE* plurality's reasoning.

Carefully considering the Williams Act's legislative history in *Piper v. Chris-Craft Industries*, 430 U.S. 1 (1977), *reh'g denied*,

Bangor Punta Corp. v. Chris-Craft Industries, Inc., 430 U.S. 976, the Supreme Court concluded "that the sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer." *Id.* at 35. The Court recognized that

> Congress was indeed committed to a policy of neutrality in contests for control, but its policy of evenhandedness does not go either to the purpose of the legislation or to whether a private cause of action is implicit in the statute. Neutrality is, rather, but one characteristic of legislation directed toward a different purpose—the protection of investors. Indeed, the statements concerning the need for Congress to maintain a neutral posture in takeover attempts are contained in the section of the Senate Report entitled "Protection of Investors." Taken in their totality, these statements confirm that what Congress had in mind was the protection of shareholders, the "pawn[s] in a form of industrial warfare." The Senate Report expressed the purpose as "plac[ing] investors on an equal footing with the takeover bidder," Senate Report 4, without favoring either the tender offeror or existing management.
>
> * * * * *
>
> The sponsors of this legislation were plainly sensitive to the suggestion that the measure would favor one side or the other in control contests; however, they made it clear that the legislation was designed solely to get needed information to the investor, the constant focal point of the committee hearings.

Id. at 29-31.

As this passage reflects, any balance of power between bidder and management afforded by the Williams Act is incidental to the legislation's "sole purpose": providing information to shareholders. The Williams Act's policy-neutrality as to bidder and management is properly described as a characteristic rather than a purpose of the statute. The Williams Act responded to takeover bidders who operated covertly to the detriment of shareholders, *see* S. Rep. No. 550, 90th Cong., 1st Sess., 2

(1967); *Piper*, 430 U.S. at 28, and is concerned with neutrality between bidder and management insofar as this neutrality protects shareholders' access to necessary information. Any other balance of power between bidder and management must arise from outside this federal law.

The *MITE* plurality's preemption analysis, as ostensibly applied by the *CTS* Court, was summarized in *BNS Inc. v. Koppers Co., Inc.*, 683 F. Supp. 458, 469 (D.Del. 1988):

> First, does the statute protect independent shareholders from coercion? Second, does the statute give either management or the offeror an advantage in communicating with stockholders? This question may be reformulated to fit the circumstances of the present case by phrasing as whether the statute gives either management or the offeror an advantage in consummating or defeating an offer. Third, does the statute impose an indefinite or unreasonable delay on offers? And fourth, does the statute allow the state government to interpose its views of fairness between willing buyers and sellers?

The latter two questions are of little assistance in the present case. The state does not interpose its views of fairness by virtue of having passed the Act, which itself expresses no view of transactions or invokes the state's power to intercede in a transaction. Any questions of fairness are appropriately considered in terms of management's relative power under the Act. Further, the Act by its terms does not directly impede a tender offer in any respect. It does not address disclosure requirements or prevent a tender offer from going forward. Rather, the statute affects business combinations following a successful tender offer.

The fundamental question implicated by the Williams Act analysis in *CTS* and *MITE* is whether the Wisconsin act impairs shareholder autonomy, providing management with an undue advantage that could hinder the shareholders' exercise of an informed choice concerning the tender offer.

It appears undisputed that the Act was intended to deter hostile tender offers for Wisconsin corporations; and it is reasonably likely that the statute will have this effect. But the extent of

this effect is speculative, and nothing about the Act prohibits any entity from purchasing or offering to purchase shares in Wisconsin corporations, or from attempting thereby to gain control. *Cf. CTS*, 107 S. Ct. at 1652. Considering Indiana's anti-takeover law, the Court stated:

> Of course, by regulating tender offers, the act makes them more expensive and thus deters them somewhat, but this type of reasonable regulation does not alter the balance between management and offeror in any significant way. The principle result of the act is . . . . fully in accord with the purposes of the Williams Act.

Id. at 1646 n.7. The "balance" properly required here is that of the power to communicate concerning tender offers. Though the *CTS* Court found no need to step beyond the *MITE* plurality's reasoning, the clear light of *Piper* leaves *MITE* very much in the shadows on this point.

To the extent the *MITE* plurality requires a balance of strategic power between bidder and management, the nature of the deterrence is relevant. The Act bans second-step mergers for three years following the interested stockholder's stock acquisition date, absent prior approval by the board of directors. After three years, a business combination may take place if: a) the prior board approval existed; b) the business combination is approved by the affirmative vote of the holders of a majority of the voting stock not beneficially owned by the interested stockholder at a meeting called for that purpose; or c) if certain stock price conditions are met. Wis. Stat. § 180.726(3). The Act does not ban takeovers *per se*, but merely delays for three years the successful bidder's ability to attain complete control over the corporation.

A delay of the free exercise of power is not unconstitutional, for "the Williams Act would preempt a variety of state corporate laws of hitherto unquestioned validity if it were construed to preempt any state statute that may limit or delay the free exercise of power after a successful tender offer." *CTS*, 107 S. Ct. at 1647. For example, staggered terms for directors and cumulative voting provisions, allowed in most states, may delay the time when a successful bidder gains control over corporate

affairs. *Id.* at 1647-48. "The long-standing prevalence of state regulation in this area suggests that, if Congress had intended to preempt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly." *Id.* at 1648.

The delay protects shareholders by discouraging unapproved freezeouts, or second-step mergers whereby remaining shareholders are forced to sell their stock for cash or securities. Tender offers contemplating freezeouts may be particularly coercive. The Supreme Court has recognized that protecting shareholders against the possibility of coercion in tender offers is a legitimate state concern. *Id.* at 1651.

Further, to find the three year delay unconstitutional would be to implicitly adopt an economic policy favoring tender offers as inherently good. The fundamental reason for the Williams Act's neutrality concerning management and bidder reflects a comprehensive view of tender offers:

> It was strongly urged during the hearings that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management. It was also recognized that these bids are made for many other reasons, and do not always reflect a desire to improve the management of the company.

S. Rep. No. 550, 90th Cong., 1st Sess. at 3. The Wisconsin act effectively eliminates hostile leveraged buyouts, in which the assets of the target company provide resources for servicing the debt incurred by the bidder in taking control. To the extent hostile offers of this nature might be deterred, shareholders may not be offered the opportunity to take advantage of the escalating stock prices likely to accompany the speculation often attending tender offers. But the state, through its legislation, may favor long-term growth and capital investment over short-term speculation.

Reflecting to some extent the 1967 Senate Report quoted above, the Supreme Court has recently given voice to the flux of economic theory enmeshing theoretical discussion of tender offers:

> No one doubts that some unsuccessful tender offers will provide more effective management or other benefits such as needed diversification. But there is no reason to *assume* that the type of conglomerate corporation that may result from repetitive takeovers necessarily will result in more effective management or otherwise be beneficial to shareholders. The divergent views in the literature—and even now being debated in the Congress—reflect the reality that the type and utility of tender offers vary widely. Of course, in many situations the offer to shareholders is simply a cash price substantially higher than the market price prior to the offer.

CTS 107 S. Ct. at 1651 n.13. Absent clear legislative directive, it is inappropriate for this court to posit all the world as Wall Street, where all the shareholders would be arbitrageurs. "The Constitution does not require the States to subscribe to any particular economic theory. [The courts] are not inclined 'to second-guess the empirical judgments of lawmakers concerning the utility of legislation,' *Kassel v. Consolidated Freightways Corp.*, 450 U.S. at 679, 101 S. Ct. at 1321 (Brennan, J., concurring in judgment)." *CTS*, 107 S. Ct. at 1651. Individual shareholders remain free to invest their money in corporations domiciled in legislative environments more conducive to speculation. If they feel hindered in this regard because they believe their shares are undervalued, they should perhaps be mindful that any stock investment bears a number of inherent risks, including the possibility that a tender offeror may never appear and bully market prices momentarily skyward.

The Act can not reasonably be said to impair shareholder decision-making in the tender offer process. The Act neither affects disclosure or timing, nor forbids tender offers themselves. The Act does provide shareholder protection in an area of legitimate state concern. Assuming the Act prevents potential bidders from ever making some tender offers, the impact of this deterrence presently appears incalculable and irrelevant. What might be of consequence is the extent to which bidders fail to receive board approval. However, a target attractive to one suitor will generally be attractive to others. Shareholders

who feel the board is responding inappropriately to bidders maintain their power to effect changes in corporate control, thereby enhancing receptivity to offers. If management, for its part,

> were to take actions designed to diminish the value of the corporation's shares [to fend off suitors], it may incur liability under state law. But this problem does not control our preemption analysis. Neither the [Williams] act nor any other federal statute can assure that shareholders do not suffer from the mismanagement of corporate officers and directors.

Id. at 1647.

In view of the shareholders' presumed influence over management, the three year delay is not logically distinguishable from other delays or inhibitions of takeovers, such as staggered terms for directors and supermajority merger vote requirements, currently permitted in many states, notwithstanding that the latter limitations often may be more directly controlled by shareholders. The Act prevents business combinations for three years, but does not hinder the successful offeror's exercise of any other attributes of control. Nothing in the Act prevents a potential bidder from seeking board approval in the first place. Nor does anything prevent an offeror from making a tender offer conditioned on board approval, whereby the suitor can effectively communicate its message to shareholders and enhance shareholder awareness. "A person is not the direct or indirect beneficial owner of stock tendered pursuant to a tender or exchange offer . . . until the tendered stock is accepted for purchases or exchange." Wis. Stat. § 180.726(1)(d)(2).

Based on its reading of Supreme Court case law, the court in *BNS v. Koppers Co., Inc.*, 683 F.Supp at 469 (D. Del. 1988), indicated that, notwithstanding a statute's "substantial alteration of the balance between management and the offeror . . . . even statutes with substantial deterrent effects on tender offers do not circumvent Williams Act goals, so long as hostile offers which are beneficial to target shareholders have a meaningful opportunity for success." But the Supreme Court does not appear to have formulated a "meaningful opportunity" test.

Indeed, such a test would raise preplexing problems of determining which hostile offers are "beneficial to shareholders," measuring "substantial deterrence," and defining "meaningful opportunity for success." And, of course, not all initially "hostile" offers remain hostile: many will inevitably result in negotiated transactions between the offeror and the target. The *BNS* court itself evidently found "meaningful opportunity" to exist, despite its conclusion that opportunities left open by the statute were heavily weighted against the offeror. *Id.* at 470-72. The same court subsequently found meaningful opportunity to exist based on statistical analysis in *RP Acquisition Corp. v. Staley Continental, Inc.*, 686 F.Supp. 476 (D. Del. 1988), but similar arguments made to this court were less than convincing on either side, particularly given the controversy surrounding these matters in the academic community and legislatures. *Cf. West Point-Pepperell, Inc. v. Farley Inc. and Trust Co. Bank*, No. 3:88-cv-57-GET, slip op. at 21-25 (N.D. Ga. Feb. 2, 1989) (noting difficulty of accurately applying "hostile/hostile" and other labels, as well as inadequacy of available data to show lack of meaningful opportunity). Ultimately, meaningful opportunity for success under the Wisconsin act can be controlled by shareholder vote in the light of board response to potential suitors. The board of directors itself, it should be remembered, remains subject to scrutiny under fudiciary standards for decisions made on behalf of the corporation.

Universal contends that even if a meaningful opportunity for tender offer success is required, the Act offers it. A hostile offeror may wage a proxy contest, purchase a controlling interest, elect sympathetic board members, dictate corporate policies, or otherwise assume voting control. Amanda contends that the Act makes a proxy contest impracticable if not legally impossible. Without finding a clear legal or practical foundation for a "meaningful opportunity" requirement, I note that foreclosing a proxy contest opportunity could frustrate or even preclude shareholder autonomy and the exercise of informed choice.

Under Wis. Stat. § 180.726(1)(j)(1)(a), an "interested stockholder" includes one who is the "beneficial owner of at least 10% of the voting power of the outstanding voting stock."

Wis. Stat. § 180.726(1)(d)(1)(d) defines "beneficial owner" as including one who "has a written or unwritten agreement, arrangement or understanding with another person that is directly or indirectly a beneficial owner . . . of the stock, if the agreement, arrangement or understanding is for the purpose of acquiring, holding disposing of or voting the stock, unless the voting is pursuant to a revocable proxy or consent described in subd. 1.c."

Amanda argues that if it attempted to engage in a proxy contest, "any 'agreements' or 'understandings' it had with other shareholders whose holdings together with Amanda's total more than 10% would alone trigger the prohibitions of the Anti-Takeover Act *before* any shareholder vote." Plaintiff's Reply Memorandum at 35. In making its argument and reciting § 180.726(d)(1)(d), Amanda neither quotes nor considers that provision's closing phrase, "unless the voting is pursuant to a revocable proxy or consent described in subd. 1.c." Wis. Stat. § 180.726(1)(d)(1)(c) provides in pertinent part:

> [A] person is not the beneficial owner of stock under this subd. 1. c if the agreement, arrangement or understanding to vote that stock arises solely from a revocable proxy or consent given in response to a proxy or consent solicitation made in accordance with the applicable regulations under the exchange act and is not reportable under the report required under 17 CFR 240.13d-1(1)(a) [sic] or a comparable or successor report.

A shareholder must file a disclosure report under 17 CFR 240.13d-1(a) upon becoming beneficial owner of 5% of any equity or security of a specified class. In turn, 17 CFR § 240.13d-3(b) provides:

> Any person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement, or device with the purpose of [sic] effect of divesting such person of beneficial ownership of a security or preventing the vesting of such beneficial ownership as part of a plan or scheme to evade the reporting requirements of section 13(d) or (g) of the act

shall be deemed for purposes of such sections to be the beneficial owner of such security.

Under these provisions, it appears possible that a potential offeror could wage a campaign pursuant to revocable proxy as long as that offeror does not otherwise benefically own 5% of the stock specified, and as long as the proxy is not used "as a part of a plan or scheme to evade the reporting requirements." To ensure clarity of intention, the potential offeror had available 17 CFR § 240.13d-4, allowing him to "expressly declare in any statement filed that the filing of such statement shall not be construed as an admission that such person is, for the purposes of sections 13(d) or 13(g) of the Act, the beneficial owner of any securities covered by the statement." Presumably, these provisions allow the shareholder sufficient room to avoid conflict with the Wisconsin act. While such a proxy campaign may require only a modicum of planning, some degree of foresight is expectable from most potential offerors. Though one who is or will become an offeror may cross the share ownership threshold inadvertently, *see Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975), such an error is not necessarily fatal under federal law and appears reversible under the Wisconsin act. Wis. Stat. § 180.726(5).

This question may be a close one, though other grounds for distinguishing interested stockholders from those conducting proxy contests also may be conceivable under the Act. Amanda, however, did not even engage in a proxy battle that might clearly invoke the need for further analysis. If the issue calls for any consideration, it presently suffices that a possible distinction appears on the statute's face. Given the presumption of constitutionality, and the evident continued availability of proxy opportunities to those interested, I can not find a constitutional violation on this ground.

Finally, I emphasize that corporations, as well as related powers and rights, are defined by state law. Federal law has long recognized the states' power to regulate the internal affairs of corporations. *See, e.g., Santa Fe Industries v. Green*, 430 U.S. at 479 (1977); *Cort v. Ash*, 427 U.S. at 84 (1975). The Wil-

liams Act itself is subject to § 28(a) of the Exchange Act, 15 U.S.C. § 78bb(a), providing:

> Nothing in this title shall affect the jurisdiction of the Securities Commission (or any agency officer performing like functions) of any state over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder.

With Justice Scalia I must agree: "[u]nless it serves no function, that language forecloses preemption on the basis of conflicting "purpose" as opposed to conflicting "provision." *CTS*, 107 S. Ct. at 1653. Nonetheless, because the *CTS* majority saw no need to explicitly question the *MITE* plurality's reasoning, I have considered this case under the Supreme Court's careful analysis of the Williams Act's purposes. Having done so, I must conclude that the Williams Act does not preempt the Wisconsin act.

B. The Commerce Clause Challenge

Amanda also argues that the Wisconsin act violates the commerce clause. This argument is effectively considered by using the *CTS* commerce clause analysis.

"The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce." *CTS* 107 S. Ct. at 1648 (citations omitted). But the Wisconsin act does not fall into this category since it has the same effect on tender offers whether or not the offeror is a Wisconsin resident or domiciliary. The Act affects both interstate and local business equally. That the Act, as a practical matter, might most often affect out of state entities because most hostile tender offers for Wisconsin corporations will come from offerors outside Wisconsin does not disturb this conclusion. Because the Act does not impose any greater burden on out-of-state offerors than it does on similarly situated Wisconsin offerors, it does not discriminate against interstate commerce. *Id.* at 1649 (quoting *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980)).

The commerce clause will also invalidate statutes that adversely affect interstate commerce by subjecting activities to inconsistent regulations. *Id.* at 1649 (citations omitted). However,

> [n]o principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders. See Restatement (Second) of Conflict of Laws § 304 (1971) (concluding that the law of the incorporating State generally should "determine the right of the a shareholder to participate in the administration of the affairs of the corporation").

Id. at 1649. Because the Act only regulates corporations chartered by Wisconsin, it creates no impermissible risk of inconsistent regulation by different states.

A majority of the *MITE* Court subscribed to a balancing test, under which "even when a state statute regulates interstate commerce indirectly, the burden imposed on that commerce must not be excessive in relation to the local interests served by the statute." *MITE*, 457 U.S. at 643 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). However, the Illinois statute under consideration in *MITE* obviously failed the more traditional commerce clause tests: it applied to tender offers for any corporation for which 10% of the outstanding shares were held by Illinois residents and it purported to give Illinois the power to determine whether a tender offer for such a corporation could proceed anywhere. *MITE*, 457 U.S. at 643. At the same time, in assessing the Illinois statute's impact on the interstate commerce, *MITE* presented a rather idealized vision favoring tender offers as a seemingly faultless mechanism for reallocating economic resources to their highest valued use and thereby improving efficiency and competition. *Id.* at 643. The Court has since viewed the securities market in a more realistic light, recognizing that some successful tender offers will provide these economic benefits, but "there is no reason to *assume* that . . . [what] will result is more effective management or otherwise . . . beneficial to shareholders." *CTS*, 107 S. Ct. at 1651 n.13. The *CTS* Court did not explicitly apply or even

accept the balancing test. Speaking specifically of corporations and securities, it merely concluded that a state need not define "commodities [owing their existence and attributes to state law] as other states do; it need only provide that residents and nonresidents have equal access to them." *Id.* at 1652.

To the extent *CTS* does implicitly compare burdens on interstate commerce with statutory benefits, its discussion is grounded on two vital assumptions. First, making corporation law is the states' prerogative:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.

Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 636 (1819), *quoted in CTS*, 107 S. Ct. at 1649-50. Second, state laws regulating corporate governance, in prohibiting certain transactions and regulating others, "necessarily affect certain aspects of interstate commerce." *Id.* at 1650. "A State has an interest in promoting stable relationships among the parties involved in corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs." *Id.* at 1651.

The *CTS* Court found only one specific benefit of the Indiana statute: protecting shareholders from coercive tender offers. *Id.* at 1651. The Wisconsin act not only provides this benefit, but also protects against highly leveraged buyouts that threaten to strip the target's assets without necessarily improving economic efficiency or shareholders' positions. Amanda counters that the Act fails to prevent management-approved abuses of this very nature. Certainly the state has a "substantial interest in preventing the corporate form from becoming a shield for unfair business dealing." *Id.* at 1651-52. The Act preserves management liability for breaching its duties to shareholders. Nothing obligates a state legislature to cure every

related corporate ill when enacting corporate regulations aimed at particular problems.

Amanda further argues that the Act infringes shareholder autonomy, giving management a virtual veto power over nationwide tender offers. Whether the Act disenfranchises shareholders is more appropriate in relation to the Williams Act preemption issue, where it has already been discussed, *supra*. Amanda's argument does raise the commerce clause question of whether the Act grants a power to management that results in an excessive burden on interstate commerce.

The Act may deter some tender offers. But it also appears designed to promote careful choice concerning allocation of economic resources to maximize managerial efficiency. Again, tender offers are not necessarily beneficial, and absent clear violation of federal law, the economic utility of legislation is best left to the empirical judgment of legislatures rather than the courts. *Id.* at 1651. The Supreme Court has "rejected the 'notion that the Commerce Clause protects the particular structure or methods of operation in a . . . market." *Id.* at 1652 (quoting *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978), *reh'g denied*, *Shell Oil Co. v. Governor of Maryland*, 439 U.S. 884. Clearly, the Act focuses on legitimate state interests.

To reiterate points made with respect to the Williams Act, the Wisconsin act does not prevent tender offers. The *CTS* Court's statement on Indiana's statute is applicable to Wisconsin's law: "This act does not prohibit any entity—resident or nonresident—from offering to purchase, or from purchasing, shares in [domestic] corporations, or from attempting thereby to gain control." *CTS*, 107 S. Ct. at 1652. The Act limits certain kinds of self-dealing. Ultimate decision-making power remains with the shareholders, who can elect directors reflecting the shareholders' receptivity to tender offers. And as with management, the Act preserves directors' responsibility for decisions made on behalf of the corporation. The Act's actual effect on tender offers is uncertain. Some degree of deterrence is acceptable. Because the Act regulates matters properly within the ambit of state power, while treating residents and nonresidents equally, "even if the act should decrease the number of

successful tender offers for [domestic] corporations, this would not offend the Commerce Clause." *Id.* at 1652. At best, any effect on interstate commerce is incidental to legitimate state regulation.

Some legislative purposes underlying the Act may well reflect protectionist motivations, such as the evident desire to protect resident domestic corporations against hostile takeovers that might result in target corporation operations leaving Wisconsin. But the Act appears no more indicative of such interests than the Indiana act upheld in *CTS*. To probe legislative history or intent in this case is not helpful. As *CTS* suggests, it is inappropriate for this court to define an economic policy concerning the inherent economic value of tender offers. In my view, Justice Scalia is again correct in stating that

> [a]s long as a State's corporation law governs only its own corporations and does not discriminate against out-of-state interests, it should survive this Court's scrutiny under the Commerce Clause, whether it promotes shareholder welfare or industrial stagnation. Beyond that, it is for the legislature to prescribe its invalidity.

Id. at 1653 (Scalia, J., concurring in part and concurring in judgment). But in reaching my conclusion it is not necessary to recognize the practical impossibility and judicial imprudence of assessing the propriety and importance of local values, measuring a statute's effectiveness in promoting these values, and making "the ultimate (and most ineffable) judgment as to whether, given importance-level *x*, and effectiveness-level *y*, the worth of the statute is "outweighed" by impact-on-commerce *z*." *Id.* at 1653. Rather, in the absence of actual discrimination against interstate commerce or an impermissible risk of inconsistent regulation, motivations underlying the Act's passage are not accurately probative of constitutionality.

Insofar as the Act might arise from protectionist purposes, these purposes are subsumed by the statute's legitimate functions. Where statutory language has a plain and unambiguous meaning, "only the most extraordinary showing of contrary intentions from those data would justify a limitation on the 'plain meaning' of the statutory language. When we find the

terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances.' " *Garcia v. United States*, 469 U.S. 70, 75 (1984) (citations omitted), *reh'g denied*, 469 U.S. 1230 (1985). *Cf. Piper*, 430 U.S. at 24-27 (analysis begins with the statute itself; reliance on legislative history in defining legislative intent is "a step to be taken cautiously"); *cf. Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976) (language of statute is controlling when sufficiently clear in its context); *cf. United States v. Oregon*, 366 U.S. 643, 648 (1961) (if statutory language is unequivocal, there is no need to resort to legislative history), *reh'g denied*, 368 U.S. 870. This conclusion is underscored by the presumption of constitutionality. The Wisconsin act, on the record before this court, does not effectively burden interstate commerce in violation of the commerce clause.

VI. THE SHAREHOLDERS RIGHTS PLAN

On September 8, 1988 at a regularly scheduled board meeting, the Universal board adopted its shareholders rights plan without shareholder approval. The rights plan had been under consideration by the Universal board beginning with its board meeting in November 1987. At almost every board meeting since that time, the board discussed the plan and received advice from both its regular outside counsel and New York counsel on the operation and benefits of the plan. New York counsel described the rights plan as common and stated that it was "designed to counteract the advantages enjoyed by corporate raiders and to enable boards of directors to better protect shareholder interests in the face of coercive acquisition techniques." New York counsel also described as one of the principal purposes of the plan the option of permitting a company to remain independent "to preserve for shareholders the long-term value of the company in the event of a takeover." In adopting the plan on September 8, 1988 the board reviewed and considered the takeover policy statement previously adopted by the board on June 5, 1980. That policy statement declared that in consid-

claims, the issue is ripe for a decision at this juncture because the redemption of the poison pill is one of the conditions of the offer and the experts agree that Amanda's offer will not proceed absent the redemption. The parties agree that redemption of the pill is governed by Wisconsin law (redemption is sought for breach of fiduciary duty, a pendent state law claim in this suit) and that, in the absence of Wisconsin precedent, a Wisconsin court would look to Delaware case law for resolution of this issue. *See, Wanvig v. Johnson Controls, Inc.*, No. 663-487 (Milw. Co. Cir. Ct. March 29, 1885) (found at Def. App. L); *Steven v. Hale-Haas Corp.*, 249 Wis. 205, 221, 23 N.W.2d 620, 628 (1946).

It is undisputed that the Universal board's adoption of the rights plan as a defensive mechanism to combat hostile tender offers is a valid exercise of its business judgment to be protected by the business judgment rule, *see Moran v. Household International, Inc.*, 500 A.2d 1346, 1348 (Del. 1985), and specifically authorized by Wisconsin law. Wis. Stat. § 180.155. This specific authorization by the Wisconsin legislature of a rights plan as adopted by Universal distinguishes this case from *West Point Pepperell, Inc. v. Farley, Inc.*, No. 3:88-CV57, (N.D. Ga. Nov. 14, 1988) (found at Pl. App. L) (where the court found no authority in either state law or the corporate articles of incorporation authorizing the adoption of a rights plan). Wis. Stat. § 180.155 authorizes a board of directors to adopt a rights plan without shareholder approval.

What is in dispute in this case is whether the board's decision to refuse to redeem the rights plan in the face of Amanda's offer is a violation of its fiduciary duties of loyalty and care which are owed to the shareholders of the company. Universal argues that its decision is entitled to the protections of the business judgment rule and should not be disturbed by the court absent a showing by Amanda of bad faith or self dealing on the part of the board. Amanda argues that a Wisconsin court would use the Delaware approach first adopted in *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). *Unocal* requires, in a takeover context, a threshold showing by the board of "reasonable grounds for believing that a danger to corporate policy and effectiveness existed" and that their

actions were "reasonable in relation to the threat posed." *Id.* at 955.

The Delaware supreme court recognized in *Unocal* that in takeover context there is an "omnipresent specter that a board may be acting predominantly in its own interests, rather than those of the corporation and its shareholders . . . ," 493 A.2d 954, which would call for judicial examination at the threshold before the protections of the business judgment rule may be conferred." *Id.* Adoption of takeover measures presents the board with the initial burden of establishing reasonable grounds for believing that a danger to corporate policy and effectiveness existed. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). The board must show initially that it acted on an informed basis, in good faith, and in the honest belief that the action was taken in the best interests of the corporation. *Moran*, 500 A.2d at 1356. If a board meets its threshold burden, the business judgment rule applies to the board's decision and the plaintiff must show bad faith or self-dealing by the board. *Id.*

I agree with Amanda that a Wisconsin court would apply the *Unocal* standard for reviewing a board's actions in connection with a hostile takeover offer, notwithstanding other jurisdictions' rejection of this standard. *See, e.g.*, Ohio Rev. Code § 1701.59(C) (rejection of *Unocal* and codification of existing common law). In this regard I note that Wis. Stat. § 180.155 appears to have codified the holding of *Moran* (regarding adoption of shareholders rights plans), and Wis. Stat. § 180.305 allows a director to consider other constituencies in the discharge of his or her duties (which appears to have codified *Revlon's* holding that a board can consider other constituencies in the context of a tender offer). However, as the facts stated below will demonstrate, even under the shifting burdens imposed by *Unocal*, I find that the Universal board acted reasonably in relation to a threat to the corporate policies and effectiveness which it in good faith believed was posed by Amanda's offer.

As previously noted, Mr. Press called Mr. Osborn on December 1 mid-afternoon to announce that the hostile tender offer would be initiated the next day and to inform Osborn that

ering any acquisition proposal, the board shall consider, among other things,

- the board's estimate of the then current value of the company in a freely negotiated transaction,
- the board's estimate of the future value of the company as an independent and ongoing business entity, and
- the adequacy of the price offered.

The rights plan adopted by Universal is a second generation rights plan and is known in Wall Street parlance as a poison pill.

Universal's rights plan operates in the following manner. The board has issued rights to each of its shareholders which attach to the shareholders' stock and do not trade separately until there is a triggering event as defined in the plan which causes the rights to detach and trade separately. In Universal's plan, that event is the accumulation of more than 20 percent of the corporation's stock or a tender offer for more than 20 percent of the stock. In the case of a tender offer, after ten days from the announcement of the tender offer the rights detach, certificates for the rights are issued, and they trade separately. Detachment of the rights may be delayed by the board, and in the instant case Universal's board has delayed the separation of the rights from the underlying shares. Under the plan the Universal board is empowered to redeem the rights at a nominal cost to the company at any time before certain triggering events which are described below. It is the redemption of these rights that Amanda seeks by its motion.

Universal's plan contains both "flip in" and "flip over" provisions. The triggering event for the "flip in" provision is the purchase of 20 percent or more of Universal's shares by the tender offeror, in this case Amanda. This triggering event gives each Universal shareholder other than the tender offeror, immediately and without board intervention, the right to purchase additional Universal shares at one-half the then quoted market value. The purchase price of the shares as stated in the plan is $75.00. Therefore, each Universal shareholder will be able to purchase $150.00 of Universal's stock for the $75.00. If

one assumes that the offer price of $35.00 is the then quoted market value, this "flip in" provision allows each shareholder to purchase over four new shares for each share now held at a 50 percent discount. If Amanda meets its minimum tender condition of 75 percent of the Universal stock, the "flip in" provision would be triggered and would dilute Universal's stake in Amanda from 75 percent to 36.2 percent. Amanda's experts testified that this would cost Amanda over $115 million in lost equity investment.[5]

There is however an exception to the "flip in" provision. If Amanda is able to purchase 80 percent or more of the outstanding Universal shares the "flip in" provision does not function and will cause no dilution to Amanda's stake in the company. Universal's experts testified that this provision affords a reasonable limitation upon the plan and is one respect in which Universal's plan differs from many other rights plans.

The "flip over" provision is triggered if Amanda seeks to merge Universal into Amanda or a subsidiary of Amanda, or if Amanda or an entity which it controls purchases substantially all of the assets of Universal.[6] Under the "flip over" provision, once one of the triggering events occurs the holders of the rights can purchase shares of Amanda at a 50 percent discount. By way of example, if Amanda acquired 90 percent of Universal's outstanding shares in the offer and attempted to merge with Universal, the remaining 10 percent shareholders would be able to purchase $150.00 worth of Amanda's shares at $75.00. This would dilute Amanda's equity interest in Universal from 90 percent to approximately 63 percent, and testimony showed that

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5 Amanda further contends that under Wis. Stat. § 180.725, it would not be able to restore the millions of shares it bought to full voting power, and the voting stake would be reduced from the 36.2 percent to approximately 25 percent. Amanda describes Wis. Stat. § 180.725 as providing that every share of Universal stock owned by Amanda in excess of 20 percent of the total is reduced in voting power to one-tenth vote per share.

6 A condition of Amanda's financing is a back end merger of the company with Amanda. Therefore, even if Amanda does manage to procure 80 percent of the outstanding stock, fulfillment of the offer's financing conditions would trigger the "flip over" provision.

the financial stake would be diluted by approximately $80 million.

Universal contends that the "flip over" provision of the rights plan subjects an acquiror to the substantial dilution only if it tries to squeeze out shareholders who choose not to sell in a tender offer. Universal contends that this provision chiefly affects only those offerors who are pursuing highly leveraged financing deals and who seek a prompt squeeze-out merger to enjoy unfettered use of corporate assets to pay down the debt incurred in the acquisition. Universal argues that a suitor of more substantial means, whose financing did not compel it to immediately liquidate corporate assets and business units to repay debt, would not be deterred by the "flip over" provision. The "flip over" provision would not prevent an offeror from purchasing a majority of shares and then operating Universal as a subsidiary. However, testimony at the hearing did establish that the majority of nationwide tender offers in 1988 contemplated a back end merger between the target and the offeror companies. Amanda's experts testified that the operation of the "flip over" provision would make the acquisition prohibitively expensive for Amanda.

There is another provision of the plan which provides an exception to the poison pill operation. This provision states that if a potential offeror holds no more than 1 percent of Universal's stock, and meets certain other conditions, it can request a shareholder meeting and seek a vote of the shareholders approving the offer. If the shareholders approve the offer, the rights must be redeemed for that offer at or above the offer price. This provision was not available to Amanda because affiliates owned approximately 3.6 percent of the Universal shares when the pill was adopted in September. Universal maintains that Amanda could sell down its shares to less than 1 percent and request the shareholder vote. However, the experts agreed that this would be a very unusual course for a tender offeror to take.

Amanda contends that the poison pill is the latest of a number of measures adopted by the board which establish its management entrenching and "Fort Apache" mentality. The first step was the payment of greenmail in February 1988 to an

investment group which owned approximately 4.9 percent of Universal stock and had approached the board with an unsolicited leverage buy out (LBO) overture. This greenmail payment took the form of Universal's repurchase price of $33.00 per share for approximately 544,000 shares of Universal's stock held by the investment group. At the time of repurchase, Universal's stock was trading at approximately $27⅝ on the New York Stock Exchange, and the greenmail payment represented a premium over market value for the repurchased shares of about $5.375 per share.[7]

The other two defensive measures adopted by the board at the September 8 meeting included a 3 for 2 stock split and the creation of an employees' stock ownership plan (ESOP). Amanda contends that each of these measures, in addition to the poison pill, was adopted specifically in response to the takeover speculation concerning Universal during the summer of 1988. As previously noted, Amanda's tender offer was commenced on December 2, 1988. It is undisputed that the Universal rights plan was not adopted in response to the Amanda offer.

The offer initially was $30.50 per share for all shares of Universal common stock and included a number of conditions. The initial offer was set by its terms to expire December 30, 1988 at midnight. The offer was increased on December 15, 1988 to $35.00 per share. The present offer is due to expire on April 4, 1989. Amanda contends that the Universal management and board response to not only the initial offer but also the increased offer was not in accord with the board's fiduciary duties of loyalty and care which it owes to the shareholders of the company. Amanda also contends that the continued refusal to redeem the rights is a breach of the board's fiduciary duties.

Amanda is challenging Universal's use of its rights plan to effectively stop the offer without a vote by its shareholders. While it is disputed that the poison pill has the effect Amanda

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7 The Pioneer Group, a substantial Universal shareholder since about January 1976, sent a letter of protest to the board complaining of the greenmail payment. Murray's testimony at the hearing established that the board offered the Pioneer Group exactly the same deal for the repurchase of its shares, and the group rejected that offer.

Amanda intended to initiate litigation against Universal in connection with the tender offer. Osborn advised Press to submit a written offer. A letter was telecopied from Mr. Press to Mr. Murray, chairman of Universal Foods and received by Osborn at approximately 4:00 P.M. The letter stated that all aspects of the offer were negotiable including the consideration to be paid. Osborn has described the tone of the phone conversation as the functional equivalent of Press putting a gun to his head. Later that afternoon, Murray called Osborn from Newark, New Jersey. Murray was advised of the phone call and the substance of Press' letter. Both Murray and Osborn determined that the offer was clearly inadequate based upon their familiarity with Universal's long-range business plan and the company's future prospects. The two had discussions with Universal's general counsel and chief financial officer concerning High Voltage (the parent of Amanda) and determined that High Voltage was a small company with no product lines related to those of Universal. On the evening of December 1 Murray and Osborn had Mr. O'Reilly, the general counsel, draft a press release to publicly disclose the fact of the offer, to state that the board of directors would meet in due course, and that Murray and Osborn would recommend to the board that it adopt or maintain its "not for sale" position. It is undisputed that both Murray and Osborn adopted their respective positions with regard to the offer prior to seeing the actual offer to purchase.

Numerous events occurred on December 2 and over the next couple of days. Osborn and Murray contacted each of the directors to inform them of the offer and to arrange a board meeting to discuss and determine how to respond to the offer. The December 1 press release was issued, which actually crossed the Wall Street wires in the early morning of December 2. Later in the morning on December 2, Osborn issued a memo to all Universal Foods locations announcing his and Murray's intentions to recommend that the board reaffirm its "not for sale" position. Osborn ordered the company's Washington lobbyist to contact relevant government officials to tell them that Universal opposes the tender offer. Murray and Osborn calculated, on December 2, 1988, the number of friendly shares that could be

counted on to oppose the offer.[8] Amanda also claims that Osborn and Murray spent the weekend contacting the independent directors and lining up the directors' uniformed opposition to this offer. However, the testimony shows that the directors, after learning of the offer, determined on their own to remain independent, to avoid contact with Universal's management, and to await review of the offer and the board of directors meeting to determine the company's response to the offer.

The board of directors meeting was scheduled for December 8, 1988. After scheduling the meeting, Murray and Osborn requested that William Sword and Company, Inc., an investment banking firm, prepare for the meeting a list of all the alternatives a board could consider in responding to Amanda's offer. Additionally, Goldman, Sachs & Co., Universal's investment banking advisor, was given free access to all financial and business information it requested. However, no investment banker's opinion as to the adequacy of the offer was requested by Murray and Osborn. Both gentlemen, as well as the independent directors who testified at the hearing (Veneman and Kendall), felt that they were familiar enough with Universal and its business plans and the future of the company to know without an investment banker's opinion that the $30.50 offer was inadequate.

At the December 8 meeting, all thirteen directors were in attendance, and the meeting lasted between seven and eight hours. The board heard the presentation of Sword and Company, and also heard from its legal counsel, both regular outside counsel and specially retained counsel. The investment banking advisor, Goldman Sachs and Company, was also in attendance at the December 8 meeting. However, Goldman Sachs did not give a presentation at the meeting concerning the economics of the Amanda offer, or an opinion as to the fairness of the offer or the value of the company as an independent and ongoing business entity. Legal counsel advised the directors of

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8 These shares included 195,000 shares in the company pension plan, 32,150 shares held by Universal's charitable foundation, 276,953 held by Universal's 401K Benefit Plan, and 116,292 shares held by Universal's ESOP and 554,936 owned by Universal's officers and directors.

all aspects of the offer, and also advised the directors of their duties as fiduciaries for the shareholders under the law. Legal counsel stated that the directors could, consistent with their fiduciary responsibility, make a well-informed decision that the company and the shareholders would be better off by not tendering and remaining independent.

The presentation by Sword and Company involved at least 12 alternative courses of action which the board could pursue in responding to the offer which included recapitalization, management LBO, white knight/"Crown Jewel" lock-up options, further acquisitions by Universal, use of pac-man defense, etc. The board rejected recapitalization and LBO options as being unviable due to the amount of debt which Universal would incur, and rejected negotiations with the bidder because of the low price of the $30.50 offer. At the hearing, the directors testified that they did not request an adequacy opinion from Goldman Sachs because they did not want to signal Wall Street that this offer was too low and Amanda should sweeten the pot and come back with a higher offer. The board felt that it was in the best interests of the company and the shareholders to remain independent so that the shareholders could reap the benefits of the repositioning of the company which was begun in 1984 and was only now being realized.

Amanda has gone to great pains throughout these proceedings to show by affidavit, exhibit or testimony that Universal did not get an adequacy opinion from Goldman Sachs, did not fully comply with its own takeover policy, and acted in a completely self-serving fashion in rejecting the offer at the December 8 meeting. However, testimony and the board minutes show that after the various presentations, the management board of directors left the room, and the ten independent directors, in the presence of legal counsel, discussed for some considerable time the offer and its impact on the company. The Universal board of directors went to great lengths to maintain its independence in connection with this offer and, considering ten of the thirteen members are actually independent, I find no evidence in the record which convinces me that the board failed to review this offer in a dispassionate and neutral manner. The independent directors had informally decided to recommend to the

shareholders to reject Amanda's offer and remain independent. At that juncture management directors returned to the room, and the independent directors explained to Goldman Sachs the course of action they intended to follow. They asked for the Goldman Sachs position on that and whether or not the investment banker would stand behind the board. The Goldman Sachs advisor answered to the affirmative. It was at that point the board formally voted to recommend the shareholders reject the Amanda offer.

Were the actions of the board of directors at the December 8 meeting in violation of their fiduciary duties to their shareholders? I think not. As I noted, the meeting lasted for seven to eight hours, the directors thoroughly reviewed the offer, and the independent directors remained independent and did not rubber-stamp the initial position of management. Even if there were some indiscretion on the part of management in initially opposing the offer, that in itself would not support this court ordering redemption of the poison pill or the rights plan. Professor Gerald, an economic expert who testified on behalf of Amanda at the hearing, was asked during his testimony whether the board made a mistake in recommending at the December 8 meeting that the shareholders not tender. His answer was, "They got $35.00 after that." None of the shareholders are any worse off for the actions taken by the Universal board through the December 8 meeting and in fact are much better off due to the increased offer which Amanda made on December 16, 1988.

On December 20, 1988 the board again met, this time to review the increased $35.00 per share offer made by Amanda. This meeting lasted almost four hours. At the December 20, 1988 directors meeting, the board again received presentations from legal counsel, both concerning the revised offer and the course of the litigation which Amanda had commenced. The ten independent directors again considered the offer outside of the presence of the management directors. The directors testified that they considered the revised offer in light of Universal's long-range plans, the future growth of the company, the lack of experience and lack of any connection with the food industry on the part of HVE, Levy and Press. Goldman Sachs made a presentation to the board involving the financing and debt to be

incurred in the tender offer and Universal's cash flow and determined that the cash flow after the Amanda acquisition would be insufficient to cover both Universal's cash needs and the heavy acquisition debt.[9] Joseph R. Zimmel, Goldman Sachs' representative, informed the board at the December 20 meeting that the reductions in research and development, capital expenditures, and personnel layoffs would be likely considering its analysis in the negative cash flow. Another source of servicing that cash flow would be additional borrowings by Amanda or HVE. This analysis led the board to determine that it would not only be in the best interests of the shareholders to reject the tender offer because it was inadequate, but also in the best interests of its other constituencies as contemplated in Wis. Stat. § 180.305.

It is undisputed, however, that none of Universal's board of directors has ever discussed Amanda's plans for Universal with either Levy or Press, nor have they shared the financial analysis completed by Goldman Sachs with Levy and Press. Amanda argues that by failing to bring these concerns to the attention of Levy and Press, Universal has effectively closed its ears to any thoughts Amanda, Levy or Press may have for overcoming a projected negative cash flow.

By the time of the January 26, 1989 board meeting, Goldman Sachs had completed its analysis of the Kidder Peabody and Chase Manhattan Bank reports used for preparing the financing for the Amanda tender offer. Both Kidder Peabody and Chase Manhattan assumed drastic reductions in capital expenditures and almost a 50 percent reduction in what was described as "headquarters expense." Zimmel informed the board that the Kidder and Chase financial models would necessitate significant changes in Universal's business plans in order to meet the interest and principal payments required by the current financing structure. The financial models reduced capital expenditure dollar amounts to levels below the amount spent in any fiscal

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9 At the January 26, 1989 board meeting which immediately preceded the annual shareholders' meeting, Goldman Sachs did a similar presentation for the board. The January 26 presentation increased Goldman Sachs' analysis of the negative cash flow resulting from the tender offer, for a total negative cash flow after the offer of $169,000,000.

year since 1985. To Amanda's credit, Levy and Press testified that those were only models and have not been adopted by them or Amanda. They have no plans for reducing research and development or capital expenditures budgets and have no plans for changing the operation of Universal.

The highly leveraged nature of the tender offer was and is a concern to the board of directors. Veneman testified that in all his years of experience in the business community he has never seen a financing structure as confusing as the one proposed in Amanda's tender offer. Murray testified that notwithstanding good intentions on the part of Levy and Press, he was of the opinion that the two men would have no choice but to cut research and development and capital expenditures as well as philanthropic activity, all of which represents an integral part of Universal's status as a corporate role model.[10]

Amanda presented the testimony of Professor Nichols, a professor of economics at the University of Wisconsin, Madison. He stated that he had analyzed the operations of HVE since it was purchased by Hyde Park in March 1988, has met with its employees and managers, and talked with Mr. Press. He concluded that based upon his research, Levy and Press and HVE had no plans for Universal which would adversely affect any other constituencies, be they suppliers, customers, or employees of Universal. Professor Nichols' analysis, which may indeed be correct, demonstrates that at best the prospect for Universal's other constituencies, like the other constituencies of HVE are, for *the short term*, not endangered by the Amanda offer. However, simply due to the short period of time (March 1988 through January 1989) which Professor Nichols' research of HVE encompassed, his testimony cannot in any sense overcome the concerns which the Universal board of directors has for

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10 In this later regard Murray testified that Universal is a member of the Greater Milwaukee Initiative and contributes 2 percent of its pretax earnings for charitable purposes. Universal and its managerial executives participate in numerous charitable and community activities such as YMCA, the Boys and Girls Clubs, the University of Wisconsin Milwaukee Foundation, Marquette University, and the National Council of Blindness. Recipients of charitable organizations include the Repertory Theatre, Cardinal Strich College, Alverno College, and a variety of other social agencies.

Universal's other constituencies in the long run. Universal's business plans extend for several years into the future. While I may or may not have reached the same conclusion as to Amanda's plans for Universal as did the Universal board, the fact remains that this is a business judgment call not to be second-guessed by this or any other court. The board has the responsibility to exercise its business judgment in accord with the best interests of the shareholders, the company, and the other constituencies.

Amanda contends that in failing to request a formal adequacy opinion from Goldman Sachs, the board acted in an uninformed manner as a matter of law. *Smith v. Van Gorkum*, 488 A.2d 858 (Del. 1985). However, *Smith* involved the sale of the corporation, an entirely different circumstance than is present in this case. In *Smith*, the board acted in a grossly negligent manner in failing to investigate the value of the company, accepting a managing director's recommendation on the price and failing to investigate the offer to determine that the managing director was also interested in the purchasing company. 488 A.2d at 874. In this case, the independent directors ascertained from their own knowledge and experiences that the offer was inadequate in light of the future prospects of the company.

Amanda further challenges the board's actions in failing to negotiate with Amanda, or to do anything other than "just say no" to the offer, such as finding other potential purchasers including a "white knight" or pursuing a management LBO or recapitalization. Universal contends that it is within its prerogatives to reject these other responses to hostile tender offers and to simply remain independent. In the opinion of Universal management, they are not "just saying no", but are instead saying yes—yes to the future prospects of the company. I find no support in the case law that a company must negotiate with a tender offeror. This is especially true where, as here, the offeror has not approached the company prior to commencing the offer and related litigation.

I also disagree with Amanda that *Unocal* and its progeny require a target company, faced with a hostile tender offer, to place itself on the auction block or burden itself with debt in an amount such as would reasonably threaten its continued exist-

ence. If faced with a tender offer which the board reasonably believes to be a serious threat to the corporation and its shareholders, then the board should take measures to alleviate that threat.

The *Unocal* court, in describing the threats which may confront a company in a tender offer setting, included, "inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally), the risk of nonconsummation, and the quality of the securities being offered in exchange." 493 A.2d at 955. Amanda argues that no threat is present in this offer because the offer is all cash for all shares and contemplates a back end merger at the same price and consideration shortly after the offer expires. Amanda contends that such an offer is noncoercive and must be allowed to be voted on by the shareholders.

There is an element of coercion or risk even in an all cash, all shares offer such as Amanda's, and this was recognized by the Delaware Chancery Court in *Grand Metropolitan v. The Pillsbury Company*, Case No. 10319, Memo. Op. at 13, (December 16, 1988) (found at Def. App. Exh. P). In *Pillsbury*, the tender offer retained an escape clause allowing Grand Met to avoid the second-step merger, just as Amanda's does. The *Pillsbury* court noted, and it is borne out in the testimony in this case, that such clauses are commonly used in tender offers, and may even be boilerplate language. Amanda places considerable reliance on *Pillsbury*, since in that case the Chancery Court enjoined Pillsbury's use of its poison pill or rights plan to defeat Grand Met's offer. While the Chancery Court recognized the possibility of risk to the non-tendering shareholders, it did not feel that the risk "as to a 12%/13% minority is so serious as to deprive the holders of the 87% majority of their right to elect whether to accept or reject the Grand Met offer." Mem. Op. at 31. The 87% majority had already tendered their shares to Grand Met and the Pillsbury management was using the pill to protect its own restructuring plan which (1) did not guarantee an equal or greater value to the shareholders and (2) included the sale of the company in the next three- to five-year period.

financing is in accord with the margin rules (an issue not reached today). Thus, any number of eventualities may occur, any one of which may require the board to reevaluate its position. However, on the record before me I find no basis to conclude other than that the board has acted in accord with its fiduciary responsibilities in a manner reasonably related to the perceived threat to the corporation, its shareholders, and other constituencies. Amanda's motion for a preliminary injunction requiring redemption of the shareholders rights plan will therefore be denied.

V. CONCLUSION

In conclusion then, each of the motions presently before the court will be denied. Universal's motion to enjoin the offer pending a new offer to purchase will be denied because (a) it lacks standing to challenge the alleged margin rule violations, and (b) it has not demonstrated a substantial enough likelihood of success on the merits to overcome the harm which granting such an injunction would cause to Amanda. In addition, I find that Universal will not be irreparably harmed by denying the injunction.

Amanda's motion for injunctive relief under the Williams Act will be denied because the alleged violations upon which Amanda relies are moot and will not support the relief sought. Amanda's motion regarding the statute will be denied, for it neither hinders interstate commerce in violation of the commerce clause nor is preempted by the Williams Act. Finally, Amanda's motion for injunctive relief regarding Universal's use of its shareholders rights plan will be denied because it has not demonstrated a likelihood of success on the issue of the alleged breach of fiduciary duty by the Universal board of directors.

Accordingly,

IT IS ORDERED that Amanda's motion for a preliminary injunction regarding Universal's alleged violations of the securities laws be and the same is hereby DENIED; and

IT IS FURTHER ORDERED that Amanda's motion for injunctive and declaratory relief regarding the Wisconsin Business Combination Act be and the same is hereby DENIED; and

IT IS FURTHER ORDERED that Amanda's motion for a preliminary mandatory injunction requiring redemption of the Universal shareholder rights plan be and the same is hereby DENIED; and

IT IS FURTHER ORDERED that Universal's motion for preliminary injunction enjoining counterclaim defendants' pursuit of the tender offer be and the same is hereby DENIED.

Dated Milwaukee, Wisconsin this 18th day of March, 1989.

BY THE COURT:

By: /s/ J.P. STADTMUELLER
J.P. Stadtmueller
U.S. District Judge

180.726. *Restrictions on certain business combinations involving a resident domestic corporation and interested stockholder*

(1) Definitions. In this section:

(a) "Affiliate" has the meaning given in s. 180.752(1).

(b) "Announcement date" means the date of the first public announcement of the final, definitive proposal for a business combination.

(c) "Associate" of a person means any of the following:

1. A corporation or organization of which the person is an officer, director or partner or is the beneficial owner of at least 10% of any class of voting stock.

2. A trust or other estate in which the person has a substantial beneficial interest or as to which the person serves as trustee or in a similar fiduciary capacity.

3. A relative or spouse of the person, or a relative of the spouse, who has the same principal residence as the person.

(d)1. "Beneficial owner" of stock means a person, except as provided in subd. 2, that meets any of the following conditions:

a. Individually, or with or through any of the person's affiliates or associates, beneficially owns the stock, directly or indirectly.

b. Individually, or with or through any of the person's affiliates or associates, directly or indirectly has the right, whether exercisable immediately or only after the passage of time, to acquire the stock pursuant to a written or unwritten agreement, arrangement or understanding or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise.

c. Individually, or with or through any of the person's affiliates or associates, directly or indirectly has the right to vote the stock pursuant to a written or unwritten agreement, arrangement or understanding, except that a person is not the beneficial owner of stock under this subd. 1.c if the agreement, arrangement or understanding to vote that stock arises solely

from a revocable proxy or consent given in response to a proxy or consent solicitation made in accordance with the applicable regulations under the exchange act and is not reportable under the report required under 17 CFR 240.13d-1(1)(a) or a comparable or successor report.

d. Has a written or unwritten agreement, arrangement or understanding with another person that is directly or indirectly a beneficial owner, or whose affiliates or associates are direct or indirect beneficial owners, of the stock, if the agreement, arrangement or understanding is for the purpose of acquiring, holding, disposing of or voting the stock, unless the voting is pursuant to a revocable proxy or consent described in subd. 1.c.

2. A person is not the direct or indirect beneficial owner of stock tendered pursuant to a tender or exchange offer which is made by that person or an affiliate or associate of that person until the tendered stock is accepted for purchase or exchange.

(e) "Business combination" means any of the following:

1. A merger, including a merger under s. 180.685, or consolidation of the resident domestic corporation or any subsidiary of the resident domestic corporation with any of the following:

a. An interested stockholder.

b. A corporation, whether or not it is an interested stockholder, which is, or after a merger or consolidation would be, an affiliate or associate of an interested stockholder.

2. A sale, lease, exchange, mortgage, pledge, transfer or other disposition, in one transaction or a series of transactions, to or with an interested stockholder or an affiliate or associate of an interested stockholder of assets of the resident domestic corporation or a subsidiary of the resident domestic corporation if those assets meet any of the following conditions:

a. Have an aggregate market value equal to at least 5% of the aggregate market value of all the assets, determined on a consolidated basis, of the resident domestic corporation.

Pillsbury is fully distinguishable from this case. Approximately 87% of the shareholders had tendered, compared with at present approximately 27% of the Universal shareholders. Pillsbury had been experiencing a prolonged period of low productivity and decreasing earnings, while Universal is in the midst of now realizing the full potential of its restructuring and has enjoyed both increasing earnings and stock prices. The Universal board reasonably sees a threat to the shareholders who will not tender and also to the shareholders in general, based on the overall timing of the Amanda offer. The shareholders have the potential of reaping the benefits of not only the past successes but the future potential.

The threat relied on by Universal from the outset concerns the adequacy of the offer. The Universal board determined that the initial offer of $30.50 was inadequate, and I do not find that this conclusion was made on an uninformed basis. The board has also determined, even without a formal investment banker's opinion, that the $35.00 offer is inadequate. This conclusion is based on its determination of the future value of the company, market analyses done by Robert W. Baird & Co. and Donaldson, Lufkin & Jenrette, and the market price of the stock. (The Baird study projects a Universal stock price of $37.00–$39.00 in 9-12 months and $45.00–$47.00 in 21-24 months. The Donaldson study projects a better than expected year for Universal in relation to other food and beverage companies. Universal's stock has been trading above or very close to the offer price since the offer was first commenced.) Amanda submitted a Fairness Evaluation from Houlihan, Lokey, Howard & Zukin, Inc. which states that the $35.00 offer price is fair and adequate, to rebut the board's conclusions.

I have already concluded that the board's failure to secure an adequacy opinion was not, under the facts of this case, a breach of its fiduciary duties. Moreover, my decision today does not require that I determine the adequacy of the offer. That is a matter best left to financial professionals, the market forces and the shareholders. The question for the moment is whether the perceived inadequacy of the offer presents a threat of sufficient magnitude to permit the board to continue to block the offer from going to the shareholders in the tender context. Or

stated another way, is the poison pill a reasonable response to the threat posed by the inadequacy of the offer or, is it one of those Draconian defenses which cannot be sanctioned?

In *City Capital Associates Limited Partnership v. Interco Inc.*, 551 A.2d 787 (Del. Ch. 1988), the court questioned whether a board could forever bar a shareholder choice based on a good-faith belief that the offer was inadequate.

> It would not be surprising or unreasonable to claim that where an offer is not coercive or deceptive (and therefore what is in issue is essentially whether the consideration it offers is attractive or not), a board—even though it may expend corporate funds to arrange alternatives or to inform shareholders of its view of fair value—is not authorized to take preclusive action. By preclusive action, I mean action that, as a practical matter, withdraws from the shareholders the option to choose between the offer and the status quo or some other board sponsored alternative.

551 A.2d at 787. Amanda argues that Universal should not be allowed to do this except possibly in the short term. *See, e.g.*, *MAI Basic Four, Inc. v. Prime Computer, Inc.*, C.A. No. 10428 (Del. Ch. Dec. 20, 1988) (available on West Law, 1988 WL 140221 (Del. Ch.)) (refusing to issue injunction requiring redemption of rights plan due to limited pendency of the offer). Universal argues that it is within the power of the board to manage corporations and if, in its good business judgment, it decides the offer is inadequate, its decision should not be disturbed.

Applying the *Unocal* standards, I am unable to conclude that a board may in all instances preclude shareholder choice solely on the basis of its own perception of the inadequacy of the offer. If no other threat is posed to the corporation and shareholders, a board must at some point allow shareholders to choose between the offer and some alternative. Whether the alternative is to remain independent and reap the future benefits with the company, as the board proposes here, or a financial restructuring as proposed in *Pillsbury*, or an auction of the company as was done in *Revlon*, the shareholders must at some

point be allowed to choose. To do otherwise is to disenfranchise the shareholders.

In the instant case, however, there are other threats in the offer. As noted, there is at this juncture a threat to the nontendering shareholders, who presently constitute the majority. There is also the threat posed by the offer and recognized by the *Interco* court, of a structurally noncoercive offer which contains false or material misleading information. *See* 551 A.2d at 787, n.10. From the record before me, one might readily conclude that the offer has not passed what might be best described as the "aroma test." The financing is extremely complex, if not convoluted, and lacks the detail one would reasonably expect to find in transactions of this nature. Whether this was deliberate or the product of a hurried effort to get the offer on the table, can only be left to speculation. However, Berisford's role in the offer was not completely disclosed until January 30, 1989 when amendment 13 to Amanda's 14D-1 was filed. Even with amendment 13, there remain questions concerning Berisford's actual control of the offer, and its role after the offer is complete. This is true despite the testimony of Press and Levy that they are the only ones with control of the offer and Universal if the offer is successful.

It is undisputed that during the planning of the offer, Levy and Press were to contribute 1% of the equity investment in return for their management fees and a 1% return on the profits of the Universal deal. Berisford and Resource were to contribute 49.5% of the equity investment in return for a 49.5% share of the profits. On November 28, 1988, three days prior to the offer, Press sent a letter to Resource stating that the deal as planned was unworkable from Berisford's perspective. At that juncture, the present structure took form. Berisford is now contributing 98% of the equity investment and receiving only a 44% stake in the company. Press and Levy, who are now contributing no equity, will get a 56% share of the company, and the sole right to control it. From these facts it comes as no surprise that serious questions concerning the roles of Messrs. Press and Levy remain unresolved in the board's mind.

Another threat which exists, and distinguishes this case from either *Interco* or *Pillsbury*, is the threat to the corporation

itself. The parties have addressed this as the constituencies issue. I believe it might be more appropriately described as the corporate issue. This threat encompasses not only a danger to a corporation's other constituencies (customers, suppliers, employee) but to the corporation itself. This offer is highly leveraged. In addition, the financial agreements between Levy, Press and the Berisford parties are very unclear in their terms. While the relationship between the various Acquisition Group parties worked for the HVE tender early in 1988, each of the terms was specifically delineated. In the instant offer, no written agreement governs the relationship of the parties. If later disputes arise, the corporation will suffer, both the long-range plans and policies (which Levy and Press want to continue) and the other constituencies (employees and suppliers and customers and communities).

The combination of problems which the board perceived in the offer, and now has a better first-hand knowledge of was a result of this litigation, the board's honest perception that the offer as inadequate, and finally the board's perception that the timing of the offered also offers a threat to corporate policies, and to shareholder return on investment, all offer a significant threat which the board has so far reasonably responded to by refusing to redeem the rights plan. Other courts have approved defensive measures which effectively precluded shareholder choice on a particular offer. *See, e.g., Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334 (Del. 1987) (upholding the company's facilitation of a "street sweep" by issuance of a dividend and consummation of a new stand still agreement with largest shareholder, all without shareholder approval, as reasonable in light of the threat the coercive, two tiered tender offer posed).

Whether the board's continued refusal to redeem will remain reasonable will depend on facts yet unknown. Amanda may raise its offer price, which may in turn necessitate the board requesting an adequacy opinion. Another offeror may emerge to challenge Amanda and the board's alternative of remaining independent. The Acquisition Group may clear up the ambiguities within its own relationship, and may establish beyond any doubt (through the Federal Reserve Board or the SEC) that the

b. Have an aggregate market value equal to at least 5% of the aggregate market value of all the outstanding stock of the resident domestic corporation.

c. Represent at least 10% of the earning power or income, determined on a consolidated basis, of the resident domestic corporation.

3. The issuance or transfer by the resident domestic corporation or a subsidiary of the resident domestic corporation, in one transaction or a series of transactions, of any stock of the resident domestic corporation or a subsidiary of the resident domestic corporation if all of the following conditions are satisfied:

a. The stock has an aggregate market value equal to at least 5% of the aggregate market value of all the outstanding stock of the resident domestic corporation.

b. The stock is issued or transferred to an interested stockholder or an affiliate or associate of an interested stockholder, except for stock of the resident domestic corporation or such subsidiary issued or transferred pursuant to the exercise of warrants, rights or options to purchase such stock offered, or a dividend paid, or distribution made, proportionately to all stockholders of the resident domestic corporation.

4. The adoption of a plan or proposal for the liquidation or dissolution of the resident domestic corporation which is proposed by, on behalf of, or pursuant to a written or unwritten agreement, arrangement or understanding with, an interested stockholder or an affiliate or associate of an interested stockholder.

5. Any of the following, if the direct or indirect effect is to increase the proportionate share of the outstanding stock of a class or series or securities convertible into voting stock of the resident domestic corporation or a subsidiary of the resident domestic corporation beneficially owned by the interested stockholder or an affiliate or associate of the interested stockholder, unless the increase is the result of immaterial changes due to fractional share adjustments:

a. A reclassification of securities, including, without limitation, a stock split, stock dividend or other distribution of stock in respect of stock, or reverse stock split.

b. A recapitalization of the resident domestic corporation.

c. A merger or consolidation of the resident domestic corporation with a subsidiary of the resident domestic corporation.

d. Any other transaction, whether or not with, into or involving the interested stockholder, which is proposed by, on behalf of, or pursuant to a written or unwritten agreement, arrangement or understanding with, the interested stockholder or an affiliate or associate of the interested stockholder.

6. Receipt by an interested stockholder or an affiliate or associate of an interested stockholder of the direct or indirect benefit of a loan, advance, guarantee, pledge or other financial assistance or a tax credit or other tax advantage provided by or through the resident domestic corporation or any subsidiary of the resident domestic corporation, unless the interested stockholder receives the benefit proportionately as a holder of stock of the resident domestic corporation.

(g) "Consummation date" means the date of consummation of a business combination.

(h)1. "Control", "controlled by" or "under common control with" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting stock, except as provided in subd. 2, by contract, or otherwise.

2. "Control" of a corporation is not established under subd. 1 if a person, in good faith and not for the purpose of circumventing this section, holds voting power as an agent, bank, broker, nominee, custodian or trustee for one or more beneficial owners who do not individually or as a group have control of that corporation.

(i) "Exchange act" means the securities exchange act of 1934[1] and amendments thereto.

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1 15 U.S.C.A. § 78a et seq.

(j)1. "Interested stockholder", with respect to a resident domestic corporation, means a person other than the resident domestic corporation or a subsidiary of the resident domestic corporation that meets any of the following conditions:

a. Is the beneficial owner of at least 10% of the voting power of the outstanding voting stock of that resident domestic corporation.

b. Is an affiliate or associate of that resident domestic corporation and at any time within 3 years immediately before the date in question was the beneficial owner of at least 10% of the voting power of the then outstanding voting stock of that resident domestic corporation.

2. For the purpose of determining whether a person is an interested stockholder, the number of shares of voting stock of the resident domestic corporation considered outstanding includes shares beneficially owned by the person but does not include any other unissued shares of voting stock of the resident domestic corporation which may be issuable pursuant to an agreement, arrangement or understanding, or upon exercise of conversion rights, warrants or options, or otherwise.

(l)1. "Resident domestic corporation" means a domestic corporation that, as of the stock acquisition date in question, satisfies any of the following:

a. Its principal executive offices are located in this state.

b. It has significant business operations located in this state.

c. More than 10% of the holders of record of its shares are residents of this state.

d. More than 10% of its shares are held of record by residents of this state.

2. For purposes of subd. 1.c and d, the record date for determining the percentages and numbers of shareholders and shares is the most recent shareholder record date established under s. 180.26 before the stock acquisition date in question, and the residence of each shareholder is the address of the shareholder

which appear on the records of the resident domestic corporation.

(m) "Stock" means any of the following:

1. Shares, stock or similar security, certificate of interest, participation in a profit sharing agreement, voting trust certificate, or certificate of deposit for any of the items described in this subdivision.

2. Security which is convertible, with or without consideration, into stock, or any warrant, call or other option or privilege of buying stock, or any other security carrying a right to acquire, subscribe to or purchase stock.

(n) "Stock acquisition date", with respect to any person, means the date that that person first becomes an interested stockholder of that resident domestic corporation.

(o) "Subsidiary" of a resident domestic corporation means any other corporation, whether or not a domestic corporation, of which voting stock having a majority of the votes entitled to be cast is owned, directly or indirectly, by the resident domestic corporation.

(p) "Voting stock" means capital stock of a corporation, whether or not a domestic corporation, entitled to vote generally in the election of directors.

(2) Business combinations during the 3 years after the stock acquisition date. Except as provided in sub. (5), a resident domestic corporation may not engage in a business combination with an interested stockholder of the resident domestic corporation for 3 years after the interested stockholder's stock acquisition date unless the board of directors of the resident domestic corporation has approved, before the interested stockholder's stock acquisition date, that business combination or the purchase of stock made by the interested stockholder on that stock acquisition date.

(3) Business combinations more than 3 years after the stock acquisition date. At any time after the 3-year period described in sub. (2), the resident domestic corporation may engage in a

business combination with the interested stockholder but only if any of the following is satisfied:

(a) The board of directors of the resident domestic corporation has approved, before the interested stockholder's stock acquisition date, the purchase of stock made by the interested stockholder on that stock acquisition date.

(b) The business combination is approved by the affirmative vote of the holders of a majority of the voting stock not beneficially owned by the interested stockholder at a meeting called for that purpose.

(c) The business combination meets all of the following conditions:

1. Holders of all outstanding shares of stock of the resident domestic corporation not beneficially owned by the interested stockholder are each entitled to receive per share an aggregate amount of cash and the market value, as of the consummation date, of noncash consideration at least equal to the higher of the following:

a. The highest of: the market value per share on the announcement date with respect to the business combination, the market value per share on the interested stockholder's stock acquisition date, the highest price per share paid by the interested stockholder, including brokerage commissions, transfer taxes and soliciting dealers' fees, for shares of the same class or series within the 3 years immediately before and including the announcement date of the business combination, or the highest price per share paid by the interested stockholder, including brokerage commissions, transfer taxes and soliciting dealers' fees, for shares of the same class or series within the 3 years immediately before and including the interested stockholder's stock acquisition date; plus, in each case, interest compounded annually from the earliest date on which that highest per share acquisition price was paid or the per share market value was determined, through the consummation date, at the rate for one-year U.S. treasury obligations from time to time in effect; less the aggregate amount of any cash and the market value, as

of the dividend payment date, of any noncash dividends paid per share since that date, up to the amount of that interest.

b. The highest preferential amount per share, if any, to which the holders of shares of that class or series of stock are entitled upon the voluntary or involuntary liquidation of the resident domestic corporation, plus the aggregate amount of dividends declared or due which those holders are entitled to before payment of dividends on another class or series of stock, unless the aggregate amount of those dividends is included in the preferential amount.

2. The form of consideration to be received by holders of each particular class or series of outstanding stock in the business combination is in cash or, if the interested stockholder previously acquired shares of that class or series, the same form as the interested stockholder previously used to acquire the largest number of shares of that class or series.

(d) The business combination is a business combination as described in sub. (5)(a), (b), (c), (d) or (e).

(4) Determination of market value. For purposes of this section, the market value of stock or property other than cash or stock is determined as follows:

(a) In the case of stock by:

1. The highest closing sale price during the 30 days immediately before the date in question of a share of that class or series of stock on the composite tape for stocks listed on the New York stock exchange, or, if that class or series of stock is not quoted on the composite tape or if that class or series of stock is not listed on the New York stock exchange, on the principal U.S. securities exchange registered under the exchange act on which that class or series of stock is listed.

2. If that class or series of stock is not listed on an exchange described in subd. 1, the highest closing bid quotation for a share of that class or series of stock during the 30 days immediately before the date in question on the national association of

cles of incorporation or bylaws of a resident domestic corporation with respect to business combinations.

(b) For purposes of applying this section, if any other provision of this chapter is inconsistent with, in conflict with or contrary to this section, that provision does not apply to the extent that it is inconsistent with, in conflict with or contrary to this section.

(7) Sunset. This section does not apply after September 10, 1991.

OVERSIZE FOLDOUT(S) FOUND HERE IN THE PRINTED EDITION OF THIS VOLUME ARE FOUND FOLLOWING THE LAST PAGE OF TEXT IN THIS MICROFICHE EDITION.

SEE FOLDOUT NO 1

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

May 24, 1989.

ENTERED ON AIMS MAY 30 1989

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. HUBERT L. WILL, Senior District Court Judge*

No. 89-1581 and 89-1712

AMANDA ACQUISITION CORPORATION,
Plaintiff-Appellant,
Cross-Appellee,

vs.

UNIVERSAL FOODS CORPORATION, et al.,
Defendants-Appellees,
Cross-Appellants.

Appeals from the United States District Court
for the Eastern District of Wisconsin
No. 88 C 1296
Judge Joseph P. Stadtmueller

* Hon. Hubert L. Will, Senior District Judge for the Northern District of Illinois, sitting by designation.

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, ____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of this Court entered this date. Amanda Acquisition Corporation pays costs.

securities dealers automated quotation system, or any similar system then in use.

3. If no quotations described in subd. 2 are available, the fair market value on the date in question of a share of that class or series of stock as determined in good faith by the board of directors of the resident domestic corporation.

(b) In the case of property other than cash or stock, the fair market value of the property on the date in question as determined in good faith by the board of directors of the resident domestic corporation.

(4m) Presumption of control. For purposes of this section, a person's beneficial ownership of at least 10% of the voting power of corporation's outstanding voting stock creates a presumption that the person has control of the corporation.

(5) Exclusions from section. This section does not apply to any of the following:

a. Unless the articles of incorporation provide otherwise, a business combination of a resident domestic corporation with an interested stockholder if the resident domestic corporation did not have a class of voting stock registered or traded on a national securities exchange or registered under section 12(g) of the exchange act on the interested stockholder's stock acquisition date.

b. Unless the articles of incorporation provide otherwise, a business combination with an interested stockholder who was an interested stockholder immediately before September 10, 1987, unless subsequently the interested stockholder increased its beneficial ownership of the voting power of the outstanding voting stock of the resident domestic corporation to a proportion in excess of the proportion of voting power that the interested stockholder beneficially owned immediately before September 10, 1987, excluding an increase approved by the board of directors of the resident domestic corporation before the increase occurred.

c. A business combination of a resident domestic corporation with an interested stockholder which became an interested stockholder inadvertently, if the interested stockholder satisfies all of the following:

1. As soon as practicable divests itself of a sufficient amount of the voting stock of the resident domestic corporation so that the interested stockholder is no longer the beneficial owner of at least 10% of the voting power of the outstanding voting stock of the resident domestic corporation, or a subsidiary of that resident domestic corporation.

2. Would not at any time within the 3 years before the announcement date with respect to the business combination in question have been an interested stockholder except for the inadvertent acquisition.

(d) A business combination of a resident domestic corporation with an interested stockholder which was an interested stockholder immediately before September 10, 1987, and inadvertently increased its beneficial ownership of the voting power of the outstanding voting stock of the resident domestic corporation to a proportion in excess of the proportion of voting power that the interested stockholder beneficially owned immediately before September 10, 1987, if the interested stockholder divests itself of a sufficient amount of voting stock so that the interested stockholder is no longer the beneficial owner of a proportion of the voting power in excess of the proportion of voting power that the interested stockholder held immediately before September 10, 1987.

(e) A business combination of a resident domestic corporation if the business combination is governed by s. 180.04(6), with respect to acquiring or holding stock of a state bank or trust company, or by s. 186.31, 186.41, 215.36, 215.53, 215.73, 221.25, 221.58 or 223.11.

(6) Relationship of section to other laws. (a) The requirements of this section are in addition to the requirements of other applicable law, including the other provisions of this chapter, and any additional requirements contained in the arti-